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AN

EPITOME AND ANALYSIS

OF

SAVIGNY'S TREATISE

ON

OBLIGATIONS IN ROMAN LAW.

BY ARCHIBALD BROWN,

OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW; M.A. EDIN. AND OXON; AND B.C.L. OXON.

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TO

JAMES ROBERT HOPE-SCOTT, ESQ.,

Q. C., D. C. L., ETC.,

A BENCHER OF THE INNER TEMPLE, LONDON,

THIS EPITOME AND ANALYSIS OF THE ROMAN

LAW OF OBLIGATIONS

IS DEDICATED.

PREFACE.

THE treatise of Savigny on Obligations, of which the following work is an epitome and analysis, is a beautiful specimen of analytical reasoning in law, it is also a trustworthy statement and exposition of nearly all the passages bearing upon the subject that are to be found in the Sources.

The epitome and analysis was primarily intended to assist some candidates for the B. C. L. Examination, Oxford, who had intrusted to me the supervision of their studies in their preparation for that examination; but conceiving afterwards that the epitome and analysis, if more perfected, would be of service to students generally of the Roman Civil Law, and might even prove not unacceptable to the legal profession generally, I resolved to give it a more perfect character accordingly.

In preparing this work, I have aimed at combining three qualities, namely, the facility of the vernacular idiom, the brevity of an epitome, and the transparency of an analysis, this triple combination being calculated precisely to relieve the triple difficulty of a foreign language, a lengthened

argument, and an obscure connection, which attend the reader in his study of the work in the original. To have made a mere translation of the two volumes of the original would have been a much easier task than the production of this analysis has been; but if the result is better than the process, the perception of truth in the analysis will prove more advantageous than the pursuit of it in the original, the more especially as the pursuit will often prove bewildering and unsuccessful, while the perception is both easy and assured.

For all these reasons the author entertains the hope that his work may prove a not unwelcome publication.

A. Brown.

Lincoln's Inn, London,
19*th Septr.* 1872.

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THE LAW OF OBLIGATIONS.

§ 1.

THE Law of Obligations is the commencement of the *special* part of the system of Roman Law. The Law of Obligations has itself, however, a general as well as a special part,—the general part comprising a study of,—

1. The *Nature* of Obligations,
2. The *Sources* of Obligations,
3. The *Extinction* of Obligations,

and 4. The *Remedies for the Breach* of Obligations.

It is well to prefix the General to the Special part in the treatment of obligations, not only for the general reasons which recommend this method of treatment in every branch of law, but also and more especially for the following reasons, which are peculiarly applicable to obligations, namely,—

a. The wider area of obligations, compared with other branches of law;

and *b*. The circumstance that new obligations (which are constantly arising), until they become the subject of particular rules of law, are governed exclusively by the principles of the general part.

The *Nature* of Obligations comprises the following heads, namely,—

A. The *Idea* of the Obligation.
B. The *Varieties* of the Obligation.
C. The *Parties* to the Obligation.

and D. The *Object* or *Content* of the Obligation.

CHAPTER I.

THE *NATURE* OF OBLIGATIONS.

§2.

A. The *Idea* of the Obligation,—This idea consists in the control of one person (domination) over another person (sur une personne étrangère) to the extent of certain isolated acts of the latter (sur des actes isolées).

Thus, there figure in the idea of the obligation the following elements, namely,—

I. Two Persons, namely,—

1. The *debtor*,—his aspect of the obligation being the *Principal* one.
2. The *creditor*,—his aspect of the Obligation being the *Secondary* one.

and II. Two Qualities of Acts, namely,—

1. The quality of *Isolated*, as opposed to the quality of acts which absorb the *entirety* (intégralité) of the person;

and 2. The quality of *Restrictive*,—the idea of the *Obligation* being in this respect like the idea of the *servitude*, the former of which restricts the natural liberty of the *person*, and the latter of them the natural liberty of the *property*. Moreover, both the obligation and the servitude, as being restrictions upon the natural liberty, are admitted in law only to the extent that an absolute necessity requires: The limitation of this extent is in accordance with the general principle of the "Favor Libertatis," which is expressed in the matter of obligations in the following passage:

Dig. 44. 7. 47,—"Ubi de obligando quaeritur, propensiores esse debemus nos, si habemus occasionem, ad negandum; ubi de liberando, ex diverso, ut facilior sis ad liberationem."

Furthermore, the Obligation enures to render *certain* and *necessary* acts which before were uncertain and accidental. These acts must, however, in every case be acts that are measureable by some money-value,—

Dig. 40. 7. 9. § 2,—"*Quae pecuniâ lui praestarique possunt.*"

The Obligation has both a *Positive* and a *Negative* side,—

being, *a. Negative* on the side of the *debtor*, as appears from the following passages, namely,—

Justin. Inst. iii. 13, pref.—"Obligatio est *juris vinculum* quo necessitate *adstringimur* alicujus solvendae rei."

Dig. 44. 7. 3, pref.—"Obligationum substantia non in eo consistit ut . . . sed in eo ut *alium* nobis *obstringat* ad dandum aliquid vel faciendum vel praestandum."

and being *b. Positive* on the side of the *creditor*, as appears from the following passages, namely,—

Justin. ii. 2. 1,—"Ipsum jus obligationis incorporale est."

Dig. 45. 1. 126, § 2,—"Adquirere possumus obligationem." [The like phrase occurs in Justin. Inst. iii. 10 (11), 1.]

Now it is in the union of these two sides, and not in either side alone, that the obligation is properly said to consist, as appears from the following passage, namely,—

Justin. iii. 16, 1,—"*In utrâque tamen obligatione* una res vertitur."

§ 3.

The Obligation is to be distinguished from the following rights which are more or less analogous to it, namely,

1. Real Rights.—"Namque agit unusquisque aut cum eo qui ei obligatus est vel ex contractu vel ex maleficio . . . . aut cum eo agit qui nullo jure ei obligatus est . . . . quo casu proditae actiones *in rem* sunt, Justin. iv. 6. 1.
2. Legally valid conditions in will, which are supported *interventu judicis,*" Dig. 33. 1. 7.
3. Rights arising from the exercise of the discretionary powers of the court, *e. g.* the right to interest in certain cases, "cum hae [usurae] non sint in obligatione, sed *officio judicis praestentur.*" Dig. 19. 1. 49. § 1:

A common but erroneous theory is the analogy commonly stated thus, namely,—

That as is the *jus* (droit) of the *creditor* to the *obligation* (devoir) of the debtor,

So is the *jus* (droit) of the *proprietor* to the *obligation* (devoir) of persons generally.

This theory obscures the resemblances and differences between phrases, and misapplies the word *obligatio,*

1. By using it to indicate the side of the debtor alone, instead of leaving it to indicate (as it should do) the side of the creditor also *plus* the combination of both.

and 2. By extending it both to *real rights,* a class of rights which are characteristically distinct from obligations proper, and to those quasi-obligations which, as they subsist only in respect of the State, are not, strictly speaking, obligations in *law* at all.

A *Bond* or *Tie* is the figure lying at the root of the conception and phrase obligatio,—

Thus,—Nexum, nectere,
contractus, contrahere,
solutio, solvere,
} are all based upon that figure;

The sources or modes of the obligatio, resemble the obligatio itself,—

Thus,—In tutelâ *ex unâ obligatione,* duae sunt actiones: Dig. 27. 3. 1. § 21.

§ 4.

The obligatio contrasts—

1. With the *family relation,*—

The *two persons* figuring in both, but the *acts* which have place in the *family relation,* being neither *isolated,* nor yet *restrictive* in the sense of the Obligation Proper, *i. e.* of a *stranger's* control:

and 2. With the *law of property* or *of things,*—

The person of the debtor in the obligation becoming, *when externalised,* like a fraction or part of the material world of property; moreover, both the *obligatio* and the *real right* alike possess a money value, and both have alike as their end (immediate or remote) the acquisition of property:

The constituents of the obligatio (*facta juridica*) are,—

1. The *general* constituents,—called also *essentialia,* and expressed *e. g.* in the following passage, "Emptionis *substantia* consistit ex pretio,—" Dig. 18. 1. 72. pref.

and 2. The *special* constituents,—being

either *a.* Those called *naturalia,* which are expressed *e. g.* in the following passage,—"quod si nihil convenerit, tunc ea praestabuntur quae *naturaliter* insunt hujus judicii potestati,"—Dig. 19. 1. 11. § 1:

or *b.* Those called *accidentalia,* which are expressed *e. g.* in the following passage,—"potest mandatum ex pacto etiam *naturam suam excedere,*"—Dig. 19. 5. 5. § 4.

§ 5.

B. The *Varieties* of the Obligatio,—

These varieties are two in number, being

1. *Civil* Obligations,

and 2. *Natural* Obligations:

These varieties of the obligation may arise from one or other of the following circumstances, namely,—

Firstly, 1. From the circumstance of the *Origin* of the obligation,— } according as that is either 1. In *civil* law, or 2. In *natural* law:

See Dig. 1. 1. 5,—"Ex hoc *jure gentium* . . . obligationes institutae, exceptis quibusdam quae *jure civili* introductae sunt,"

Also,—Just. Inst. 1. 2. 2.—"Ex hoc *jure gentium* et omnes paene contractus introducti sunt."

Also,—Dig. 50. 17. 84. § 1.—"Is naturâ debet, quem *jure gentium* dare oportet, cujus fidem secuti sumus."

The particular origins of the *natural* obligation, on the one hand, are the three following circumstances, namely,—

1. The free will of the debtor,
2. The unjust enrichment of the debtor, as this second origin is indicated in the following passages, namely,—

Dig. 12. 6. 14.—"Naturâ aequum est, neminem cum alterius detrimento fieri locupletiorem." Dig. 26. 8. 5. pref.—"Cum solus tutor mutuam pecuniam pupillo dederit, vel ab eo stipuletur, non erit obligatus tutori: *naturaliter tamen obligabitur* in quantum locupletior factus est: nam in pupillum non tantum tutori, verum cuivis, actionem in quantum locupletior factus est, dandam D. Pius rescripsit."

and, 3, The reparation of a delict (indemnité).

The particular origins of the *civil* obligation on the other hand are the following five circumstances, namely,—

1. *Literae,*
2. *Nexum,*
3. *Verba,*
4. *Judicatum,*
and 5. *Poena.*

} All these five particular origins being more or less *arbitrary* and *national.*

§ 6.

But again these varieties of obligation may arise,

Secondly, 2. From the circumstance of the *capacity* of the Creditor or of the Debtor,— according as he is, either, 1. A Civis, or, 2. A Peregrinus;

Some obligations, and these the majority, being accessible to all, irrespectively of citizenship, while others are accessible to Roman citizens only:

This *capacity* or *incapacity* must be considered with reference to each particular obligation: Therefore,—

Firstly, 1. With reference to the *Literis* Obligatio: According to Gaius iii. 132-3, the so-called, but mis-called *arcaria* nomina, being a falsely supposed variety of this obligation, were admittedly within the competence of *peregrini*; but as to *nomina* properly so-called, the authorities were conflicting, some being of opinion that they were not (in either of their forms, whether in the form *a re in personam transcriptitia*, or in that *a personâ in personam transcriptitia*), within the competence of *peregrini*, while others were of opinion (and with these latter Savigny agrees) that the *nomen transcriptitium* when in the form *a re in personam*, was practically within the competence of peregrini, being a *uni*lateral act on the part of the *civis*, and to which act the Peregrinus was competent to express his assent, in a manner that was obligatory by natural law.

Secondly, 2. With reference to the Obligation of the *Nexum*: All were agreed that it was within the exclusive competence of *cives*.

Thirdly, 3. With reference to the *Verbis* Obligatio, being the *Stipulatio*:

That was originally within the exclusive competence of *cives*, but latterly it fell within the competence of *peregrini* also, with the exception of the form *spondes? spondeo* which continued within its original narrow limits :

See Gai. iii. 93,—"Sed haec quidem verborum obligatio *dari spondes? spondeo* propria civium Romanorum est; caeterae vero juris gentium sunt, itaque inter omnes homines, sive cives Romanos sive peregrinos, valent . . . at illa verborum obligatio *dari spondes? spondeo* adeo propria civium Romanorum est, ut ne quidem in Graecum sermonem per interpretationem propriè transferri possit." [N.B. Savigny can only mean that the form *spondes? spondeo* remained down to the time of Gaius, or perhaps of Leo, peculiar to Cives; for a comparison of Justin. Inst. iii. 15 (16), shows that it also became latterly open without any distinction to Cives and Peregrini equally.]

Fourthly, 4. With reference to the *Poena* :

Poenal actions generally, and also Penalties generally, as being arbitrary and national, lay originally neither for nor against the *peregrinus*, but the necessity of things soon extended them to him, a *fictitia actio* being for that purpose early provided.

See Gai. iv. 37 : "Item civitas Romana fingitur, si eo nomine agat, aut eum eo agatur, quo nomine nostris legibus actio constituta est, si modo justum sit, eam actionem etiam ad peregrinos extendi, velut si *furtum* dicatur factum ope consiliove peregrini . . . item si peregrinus *furti* agat, civitas ei Romana fingitur. Similiter si ex lege Aquiliâ peregrinus damni injuriae agat, aut cum eo

agatur, fictâ civitate Romanâ judicium datur."

§ 7.

Lastly. These varieties of Obligation may arise:

Thirdly, 3. From the circumstance of the *Efficacy* of the Obligation, according as it is either 1. Actionable, or, 2. Non-actionable;

And that without reference, 1. To the *source* of the Obligation, which may for that matter be in the *jus civile* or in the *jus gentium* indifferently:

And also without reference, 2. To the *quality* of the action, which may for that matter be *civil*, or *honoraria*, or *extraordinaria* indifferently, as appears more particularly from the following passages, namely,—

Dig. 20. 1. 5. pref.—"Et vel pro *civili* obligatione, vel *honorariâ*, vel tantum *naturali*:

Dig. 19. 5. 5,—"Dubium non est nasci *civilem* obligationem, in quâ *actione*. . . ."

Dig. 2. 14. 1. 2. 4,—"Sed et si in alium contractum res non transeat, subsit tamen causa . . . et hinc nasci *civilem* obligationem."

And as appears also from the contrast between the following two passages:

Dig. 44. 7. 42. 1,—"*Creditores* eos accipere debemus qui aliquam actionem habent:"

Dig. 46. 3. 5. 2,—"*Indebitae* sunt usurae quae ex pacto naturaliter debebantur:"

It is true that the phrase *civilis obligatio* is frequently used to indicate merely that the *source*, apart from the *efficacy*, is in the *jus civile*, as for example, in Gai. iii. 133; nevertheless, the phrase *civilis obligatio* is better used, as it is also more frequently used, to indicate that the *efficacy*, apart from the *source*, is *actionable*; and conversely, it is true that the phrase *naturalis obligatio* is frequently used to indicate merely that the *source* is in the *jus naturale*, as for example, when the *condictio indebiti* is called *naturalis*, and in

the following passage in particular,—Dig. 45. 1. 126. 2,—"Planè si praecedat numeratio, sequatur stipulatio, non est dicendum recessum esse a naturali obligatione:" But the phrase *naturalis obligatio* is nevertheless used more appropriately when used to signify that the *efficacy* is less than actionable, that is to say, that the obligation is *non-actionable.*

It appears, therefore, resuming the argument, that obligations regarded in their *efficacy* are,—

either, 1. *Civiles*, if actionable;
or, 2. *Naturales*, if non-actionable:

That other and somewhat common distinction of obligations into—

1. *Merè civiles*,
2. *Merè naturales*,
and, 3. *Mixtae*,—

is good as being *correct* in substance, bad as not being *classical* in authority.

§ 8.

The *Natural* Obligation (meaning thereby the *non-actionable* obligation) has certain limited EFFECTS, and principally the seven following, namely,—

1. *Solutum non repetere, i. e.*, payment made in error is not recoverable where a *naturalis obligatio* opposes the recovery, in other words, the *condictio indebiti* is in such a case excluded:

   Dig. 46. 1. 16. § 4. "Naturales obligationes non eo solo aestimantur, si actio aliqua eorum nomine competit, verum etiam cum soluta pecunia repeti non potest."

2. *Compensatio, i. e.* Natural Obligation may be *set-off* against civil one:

   Justin. iv. 6. 30-39; Gai. iv. 61-63 — "Etiam quod naturâ debetur venit in compensationem."

3. *Deductio de peculio, i. e.*, the silent deduction from, or addition to, the *peculium* of a son or slave made by a father or master, on the ground of

some *natural* obligation, that being the alone quality of obligation which arises between them ;

4. *Cautio, i. e.* the engagement of a fidejussor or surety, is supportable on the *naturalis obligatio*.

Justin. iii. 20. 1 / Gai. iii. 119. — "Ac ne illud interest utrum *civilis* an *naturalis* sit obligatio, cui adjiciatur fidijussor."

5. *Constitutum, i. e.*, day of payment of a *naturalis obligatio* may validly be appointed, so as to bind the constitutor in an *action*,—

Dig. 13. 5. 1. § 7. "Debitum autem vel naturâ sufficit."

6. *Hypotheca* or *Pignus, i. e.*, a security given on the ground of a *naturalis obligatio* is a valid security.

7. *Novatio, i. e.* an obligation substituted (by means of stipulatio or otherwise) for a *naturalis* obligatio is valid, and moreover may be *actionable*.

See Justin. iii. 29. 3,—"Adeo ut interdum . . . fuisset."

In general, where the *naturalis obligatio* in any particular instance produces any one of these seven effects, there it produces also all the others of them; and yet in some instances of the *naturalis obligatio* one or some of them are wanting.

§ 9.

The *Naturalis Obligatio* (meaning thereby the *non-actionable* obligation) may be so on one or other of the following *four grounds*, namely,—

1. On account of the *Absence* of the *Formalities* required by the Civil Law ;

Thus, *usurae* required to be by means of a stipulation, and if that formality was neglected or was absent, the agreement amounted merely to a *nudum pactum*, producing *no action*. And yet even in this latter case there was a *naturalis obligatio*, as is proved by the three following passages,—

a. Dig. 46. 3. 5. 2,—"Si sint usurae debitae, et aliae indebitae, . . . putà quaedam earum ex stipulatione, quaedam ex pacto *naturaliter* debebantur."

b. Dig. 46. 3. 5. 2,—"Ex pacti conventione [usurae] datae *repeti non possunt*."

c. Dig. 13. 7. 11. 3,—"Sive autem usurae in stipulatum sint deductae sive non, si tamen *pignus et in eas obligatum fuit*, quamdiu quid ex his debetur, pigneraticia cessabit."

Unterholzner's objection to this view of the *naturalis obligatio* is not sustainable. His objection is, that the wilful neglect by the contracting parties of the known, accustomed, and necessary formalities indicates an absence of intention on their part to contract: But—

1. If the terms of the contract are otherwise exact or precise,
or, 2. If the parties are boors,
or, 3. If the contract is by letter *inter absentes*,

} the neglect of the formalities is accounted for.

Also, 1. The allegation that the natural obligation of *usurae* in the case of their arising out of a *nudum pactum* is exceptional and not usual,—this allegation is a gratuitous and perverse assumption;

Also, 2. The instance of the person *adnuens* not being bound even *naturaliter* in the case of the stipulatio, is explainable as an instance of conduct purposely designed to evade the obligation.

Dig. 45. 1. 1. § 2,—[His verò causis exceptis] praeterquam ex interrogatione et responsione verborum obligatio non contrahitur, adeo quidem ut qui non interrogati responderint *aut interrogati tantum adnuerint*, ne omnino quidem obligentur."

Also,—3. The argument derived from *permutatio* fulfilled on one side only, as where the other side makes wilful default, is a mistake, and a gross one.

§ 10.

Again, the Natural Obligation (meaning thereby the *non-actionable* obligation) may be so,—

2. On account of the *Defect* in the *capacity* of the contracting Parties who may be unable to contract a *Civil* Obligation,—as, *e. g.* is the case in the following relations, namely,—

a. In the relation of the *Paterfamilias* to the *Filius-familias*,—

Here there is no *civil* obligation,

And yet there is a *natural* obligation, as is evidenced by the presence of the *deductio de peculio*, or third of the seven effects mentioned above:

b. In the relation of the *Dominus* to his *Servus*,—

Here there is no *civil* obligation,

And yet there is a *natural* one, as is evidenced by the presence of both

a a. The *Deductio de peculio*, or third of the seven effects mentioned above,

and *b b*. The *Solutum non repetere* or first of these seven effects.

c. In the relation of the *Servus* to the *Extraneus*,—

Here there is no *civil* obligation,

Yet there is a *natural* one, as is evidenced by the presence of all the *seven* effects mentioned above, excepting only the third one of them:

[N.B.—In the relation of the *filius-familias* to the *extraneus* there is a complete *civil* obligation.]

d. In the relation of the *Pupillus* acting without the *Auctoritas* of his *Tutor*,—

Here there is no *civil* obligation; and the question of the presence or absence even of the *Naturalis* Obligation in this case is much disputed,—

And yet the *affirmative* opinion of its *presence* is the better one,—

As well, 1. On principle,—because in some cases (*a*), The principle of the *Unjust Enrichment* of one at the expense of another, and in other cases, (*b*), The principle of the *Intelligence* of the pupillus, even *sine tutore*, applies, and either of these two principles alone, *a fortiori* both of them combined, suffice at natural law to entail a *Natural Obligation*.

As also, 2. On the authorities,—because only two authors, Rufinus (Dig. 44. 7. 59.) and Neratius (Dig. 12. 6. 41.) declare for the negative, and that probably under circumstances of exception or of peculiarity; whereas *seven* authors or authorities are in favour of the affirmative view, namely,—

1. Scaevola, who admits the 4th natural effect (cautio), (Dig. 45. 1. 127.)
2. Papinian, who admits the 2nd natural effect (compensatio), (Dig. 46. 3. 95. § 2.)
3. Papinian, who admits the 1st natural effect (sol. non. rep.), (Dig. 36. 2. 25. § 9.)
4. Ulpian, who admits the 7th natural effect (novatio), (Dig. 46. 2. 1. § 1.)
5. Paul, who admits the 1st natural effect (sol. non. rep.), (Dig. 44. 7. 43.)
6. Pomponius, who admits the 1st natural effect (sol. non. rep.), (Dig. 12. 2. 42. pr.) and

7. Gaius, (iii. 119), who admits the 7th natural effect (novatio).

Therefore generally conclude for the persistence of the *naturalis obligatio*, even in this case of the *pupillus*, with probability for early times, and with certainty for Justinian's times; although perhaps it would have been better if no such persistence had been recognised or suffered.

The *Senatusconsultum Macedonianum*, which prohibited the money-lender from recovering a debt incurred by lending money to a child in *potestas* in contravention of the act, nevertheless allowed the *naturalis obligatio* to subsist, that senatus consult being in this respect different from the Senatus consultum Velleianum relative to the suretyship of women which took away even the *naturalis obligatio*.

In the case of both these *senatusconsulta*, however, the *fidejussor* (or other person claiming, whether by *hypotheca* or by *novatio* or otherwise) could plead the statute as a defence to the action, when, if compelled to pay, he would have a remedy over against the principal debtor.

§ 11.

Again, the Natural Obligation (meaning thereby the *non-actionable* obligation), may be so

3. On account of the disregard of the *Jus Gentium* for the consequences of the strict *Jus Civile*,—

e. g. *a*. Where the creditor was made the executor of his debtor, the debt was strictly extinguished, yet the creditor was allowed the right of retainer (retentio), also the right of retaining any security he might have (hypotheca)

or *b*. Where the debtor suffered a *capitis deminutio*, all his liabilities were strictly extinguished; but the creditors were left in possession of certain natural rights, which were also early provided even with a *fictitia actio*.

See Dig. 4. 5. 2. § 2: "Hi qui capite minuuntur, ex his causis quae capitis deminutionem praecesserunt manent obligati *naturaliter*."

See also Justin. iii. 10 (11). 3 : and more particularly the parallel passage in Gai. iii. 84, where, after distinguishing the debts of the adopted person, which were a charge upon and which therefore attended the inheritance (*haereditarium aes alienum*) from the personal debts of the same person, he goes on to say of the latter class of debts as follows : "De eo verò quod prius suo nomine eae personae debuerint, licet neque pater adoptivus teneatur . . . *ne que ipse quidem qui se in adoptionem dedit . . . maneat obligatus . . . quia scilicet per capitis deminutionem liberantur*, tamen in eum . . . utilis actio datur rescissâ capitis deminatione, et si adversus hanc actionem non defendantur, quae bona eorum futura fuissent, si se alieno juri non subjecissent, universa vendere creditoribus praetor permittit."

or, *c*. Where one of several joint owners (whether heirs, usufructuaries, or others) was sued and paid, for example, his proportion of a common slave's peculium, there the other joint owners were strictly discharged, but equity forbade this result.

Dig. 15. 1. 32 pref. : "Sed licet hoc jure contingat, tamen aequitas dictat judicium in eos dari, qui *occasione juris* liberantur."

Lastly, the Natural Obligation (meaning thereby the *non-actionable* obligation) may be so

4. On account of the disregard in particular of certain consequences of the strict Civil Law which were relative to *Procedure*

e. g. *a*. Where suit had been actually instituted :

Here the naturalis obligatio survived, wherever the result of the action or the consequences of the Procedure conflicted with natural equity ; this is evidenced in the two following ways, namely,—

1. Upon General Principle, aided by a comparison of Justin. iv. 13. 5 *(debes adjuvari)* with Justin. iv. 13. 1-4 *(quia iniquum est)*, where speaking of the *exceptio rei judicatae* he uses the neutral expression in § 5 above, but when speaking of contracts entered into under *duress*, or by means of *fraud*, or other like circumstance he uses the strong expression in §§ 1-4 no fewer than four successive times; and the transition in § 5 to the former of these two expressions, is altogether too marked to have been made inadvertently or otherwise than intentionally.
2. Upon particular passages, namely, the following,—

   1. Dig. 60. 12. 6,—"Julianus *verum* debitorem post litem contestatam, manente adhuc judicio, negabat solventem repetere posse, quia nec absolutus, nec condemnatus, repetere posset. Licet enim absolutus sit, *naturâ tamen debitor permanet:* similemque esse ei dicit qui ita promisit: sive navis ex Asiâ venerit, sive non venerit, quia ex unâ causâ alterius solutionis origo proficiscitur."

   2. Dig. 28. 12. 6,—"Judex si *malè* absolvit, et absolutus suâ sponte solverit, repetere non potest."

   3. Dig. 46. 1. 8. § 3,—"Et post litem contestatam fidejussor accipi potest, quia et civilis et *naturalis* subest obligatio."

   4. Dig. 20. 1. 27,—"Servum quem quis pignori dederat . . . quia debito non satisfaciebat, creditor minoris vendidit: an aliqua actio creditori in debitorem constituenda sit, quia crediti ipsius actio non sufficit ad id quod deest persequendum? . . . fingamus nullam crediti nomine actionem esse, quia forte causâ ceciderat: non existimo indignam rem animadversione et auxilio prae-

toris." Also, Dig. 20. 6. 13,—"Si deferente creditore juravit debitor se dare non oportere, pignus liberatur, quia perinde habetur, atque si judicio absolutus esset: nam et si a judice quamvis per injuriam absolutus sit debitor, tamen pignus liberatur."

5. Code 4. 31. 2,—"Ex causâ quidem judicati si debitum solutum repeti non potest, ea propter nec compensatio ejus admitti potest. Eum vero qui judicati convenitur compensationem pecuniae sibi debitae implorare posse nemini dubium est."

The distinction between *legitima judicia* and *judicia imperio continentia*, as also the effect of the *res judicata* relative to that distinction which are stated in Gai. iv. 106-7, 180-1, have no bearing upon the question of the persistance of the *naturalis obligatio*.

b. Where suit is not capable of being instituted:

Here the *naturalis obligatio* persists,

Whether, *a a*. The Remedy is merely barred (Prescription of Personal Action),

or, *b b*. The Remedy is altogether extinguished (Peremption of Personal Action),

Pfordten is altogether wrong in alleging that the prescription or limitation of actions and suits is *natural*, as having been introduced by the Praetor;

for, 1. Praescription was not, in fact, introduced by the Praetor,

and, 2. It was arbitrary and national in its *times*.

c. Where one suit has been instituted, and is over, and a second suit is instituted against the person who was the *Judex* in the former one:

Here the supposed *natural obligatio*, called *Jus Iniquum*, applied, being a supposed equity to retaliate like for like upon the unjust *judex*;

see Dig. 2. 2. 1. § 1: "Ex hac causâ *solutum repeti non* posse, Julianus putat; superesse enim naturalem causam, quae inhibet repetitionem."

§ 12.

The *Natural Obligation*,—Instances of it that are merely apparent:

1. A mistaken payment made by a wife *dotis nomine*,—
   Here the *indebiti condictio* is excluded,—This is purely *pietatis causâ*. See Dig. 12. 6. 32. § 2,—"Mulier si in eâ opinione sit, ut credat se pro dote obligatam, quidquid dotis nomine dederit, non repetit: sublatâ enim falsâ opinione relinquitur pietatis causa, ex quâ solutum repeti non potest."
2. Personal services (*operae officiales*) rendered to a patron by his freedman,—
   Here also the *condictio* is excluded,—"Naturâ enim operas patrono libertus debet." (Dig. 12. 6. 26. § 12.)
3. An Excessive payment made in consequence of an *actio de peculio*,—
   Here the *condictio* for the excess is excluded. See Dig. 12. 6. 11,—"Si is cum quo de peculio actum est, per imprudentiam plus quam in peculio est, solverit, repetere non potest." And the reason in this case is stated in Dig. 12. 6. 30. § 4,—"Is qui semel de peculio egit rursus aucto peculio de residuis debiti agere potest:" in fact, therefore, a *civil* obligation here remains after payment of part to pay the rest.
4. An Excessive payment in consequence of an *actio pro socio*,—
   Here also, the *condictio* for the excess is excluded, the *beneficium competentiae* which is available for one partner, not enuring to displace the *civil* obligation which still remains as against the other partners.

The *Natural Obligation*,—instances of it falsely so-called, which are not so much as apparent instances of it,—

1. Services rendered in return *upon*, but not in return *for*, } a gift :

   Here the idea of *gift* excludes the idea of any consideration or *quid pro quo :*

2. Payment made by an Executor (Haeres), of a legacy in full, without any deduction of the Falcidian 4th part.

   Here the payment, not being in fact made *per errorem*, is to be considered as made *pleniore officio fidei praestandae*, Dig. 24. 1. 5. § 15.

3. The Peremptory Intrusion of the Civil Law into the province of Natural Law,—

   e.g. In the intercessio of women, the *Senatusconsultum Velleianum* destroys even the Natural Obligation.

It may, however, be frankly admitted here that there are some doubtful cases, which, as lying upon the border land between the *Civil* and the *Natural* Obligation, may or may not be rendered absolutely without obligation through this antagonism of the *Civil* and the *Natural*. At all events, however, the Senatusconsultum Macedonianum (unlike the Senatusconsultum Velleianum), leaves the Naturalis Obligatio to subsist.

§ 13.

The varieties of the Obligation classified according to the measure of the *efficacy* of each,—

1. Obligations that are efficacious both by *civil* and by *natural* law,—
2. Obligations that are inefficacious both by *civil* and by *natural* law,—
3. Obligations that are inefficacious by civil or by natural law, and that either

   a. From the first,
   or, *b*. From some subsequent event,
   also either, *a*. Ipso jure,
   or, *b*. Per exceptionem

   } And that, moreover, for reasons appertaining, either
   1. To the *Civil* law,
   2. To the *Natural* law.

Whence arise the following divisions and subdivisions of Inefficacious Obligations,—

I. Those that are inefficacious *per exceptionem*,—

a. The exception being *civil* but not also *natural:* in which case, the Naturalis Obligatio continues to subsist, *e. g.* in,—

1. Senatusconsultum Macedonianum,
2. Payment made in error by a *verus* debitor,
3. The prescription or limitation of actions,
4. The Jus Iniquum.

b. The exception being *natural* as well as *civil:* in this case, the *Naturalis Obligatio* ceases to subsist, *e. g.* in,—

1. *Doli* exceptio,
2. *Metûs* „ ,
3. *Pacti* „ ,
4. Senatus consulti Velleiani, excep.
5. Juris jurandi „ ,

[See *infra* for the reason of the extinction of the Naturalis Obligatio in this case.]

II. Those that are inefficacious *ipso jure*,—

a. The *Jus* being *civil* but not also *natural:* in which case the *naturalis obligatio* continues to subsist, *e. g.* in,—

1. Nudum Pactum,
2. Relation of Paterfamilias and Filiusfamilias,
3. Relation of Dominus and Servus,
4. Relation of Slave to Extraneus,
5. Engagement of Pupillus *sine tutoris auctoritate*,
6. Restitutio per fidei commissum,
7. Capitis deminutio minima,
8. Peremption or Extinguishment of Action,

b. The *Jus* being *natural* as well as *civil:* in this case, the *naturalis obligatio* ceases to subsist, *e. g.* in,—

1. Contracts by an Infant,
2. ,, ,, a Lunatic,
3. ,, ,, a Prodigus, Gambler, &c.
4. Extinguishment of Obligation, whether happening
   by *Solutio*,
   or by *Novatio*,
   or by *Acceptilatio*,
   or by *Confusio*.

The following question has arisen relatively to class I. *b.* supra, namely,—

Does or does not the Naturalis Obligatio continue to subsist in this case,—*i. e.* where the exception is *natural* as well as *civil?*

In answer,—The Roman jurists apply this test, namely, whether the *exceptio* was intended to punish the *creditor* or to protect the *debtor;* see Dig. 12. 6. 40 (Marc. iii. Reg.)—"Qui exceptionem perpetuam habet, solutum per errorem repetere potest: sed hoc non est perpetuum. Nam si quidem ejus causâ exceptio datur cum quo agitur, solutum repetere potest, ut accidit in senatusconsulto de intercessionibus [Velleiano]; ubi vero in odium ejus cui debetur exceptio datur, perperam solutum non repetitur, veluti si filiusfamilias contra Macedonianum mutuam pecuniam acceperit et paterfamilias factus solverit, non repetit."

This test is not the true test.

In answer,—Savigny uses this test, namely, whether the exceptio is or is not natural or also natural; and he holds that where the exceptio is natural, or also natural, it extinguishes, and where it is not natural or not also natural, it does not extinguish, the naturalis obligatio itself: he considers that this test is clearly indicated in the following passage,—Dig. 50. 17. 66,—"Desinit debitor esse is, qui nactus est exceptionem *justam nec ab aequitate naturali abhorrentem.*" See also,—Justin. iv. 14. pref.; Gai. iv. 126:

And with regard to the extinction of the *naturalis obligatio* by the plea of the Senatusconsultum Velleianum, Savigny assigns an *artificial-natural* character to that plea, relying upon the passage in Dig. 16. 1. 2. § 2,—"Cum eas [mulieres] virilibus officiis fungi et ejus generis obligationibus obstringi *non sit aequum.*"

The epithet *inanes,* and neither that of *inefficaces* nor that of *sine re,* is the distinctive one for obligations of Class ii. *b.* supra: see Dig. 45. 1. 25,—"Quia superior quasi *nulla* sit exceptione obstante."

Obligations of Class I. *b.* supra are to be distinguished from those of Class II. *b. supra,*—

1. Because the EXCEPTIO which paralyses the former class, even when *naturalis,* is personal to the party, and is therefore not available for the protection of a third party not being a privy of the first party;
2. Because the ground of the *exceptio* may fall away, and in that case the *naturalis obligatio* would revive, *e. g.* in the case of a woman-surety becoming the executrix (*haeres*) of the principal debtor, "etenim inconditum est subvenire sexui mulieris quae suo nomine periclitetur," Dig. 46. 3. 95. 2:
3. Because the *exceptio,* if not pleaded, is not available as a defence; and in that case, the original cause of action becomes efficacious.

§ 14.

The place of the *Naturalis Obligatio* in modern law:

Many false notions have prevailed regarding this matter, and in particular the two following, namely,—

1. That a *naturalis obligatio* which is so as to its *source,* not being interfered with by the *civil* law, ought to have complete efficacy by the *civil* law.

and, 2. That duties dictated by the conscience merely ought to have complete efficacy by the *civil* law.

The true statement of the modern position of the *Naturalis Obligatio* is the following, namely,—Generally the theory above presented (§§ 1-13) prevails in modern law;

However, some changes have been made in that theory, and in particular the following changes have been made in it, namely,—

1. The *Naturalis Obligatio* arising out of *slavery* has naturally disappeared along with the institution of slavery itself;
2. The *Jus Iniquum* has disappeared;
3. The Capitis Deminutio,
4. The Extinguishment of the Action,

(These two have now disappeared, having, indeed, already done so in Justinian's time;)

5. Most of the others have now a very limited operation.

But, it is noteworthy that

6. The *Nudum Pactum* now produces an action:

And considering the effect of the *Nudum Pactum* in modern times, we find that,—

1. It is no longer distinguished from the *stipulation*, but is become the substitute for the latter;

and that, 2. In cases where legislation has prescribed some *positive form*, the effect which follows in case of the omission or neglect of that form is various,—

e. g. 1. The French Law requires *writing* for every contract exceeding in value 150 francs, and refuses an action upon it in case that form is neglected or omitted.

The French Law nevertheless seems to allow to the imperfect contract in this case the first of the seven effects of the naturalis obligatio mentioned above, namely, the *solutum non repetere*, — see Code Civil, 1235:

Also, *e. g.* 2. The Prussian Law requires *writing* for every contract exceeding in value 50 thalers,—and refuses all effect whatsoever in case that form is neglected or omitted, [although, indeed, if both parts of the convention have been executed, the Prussian Law refuses to interfere;] the Prussian Law is, however, in this respect inconsistent with its other enactments, which refuse the *repetitio soluti* in cases where an imperfect obligation is at the basis of the *solutio*.

§ 15.

C. The *Parties* to the Obligation.

Persons become parties to an obligation whether as creditors or as debtors, or are determined to either of these two characters, or to this character, in one or other of two ways, namely,

either, 1. By an *event* (fait),—this producing the natural and usual relation of creditor and debtor;

or, 2. By a *thing* (chose),—this producing an artificial relation which, however, merely obscures (without extinguishing) the natural relation of creditor and debtor:

Examples of the Relation of creditor and debtor established in the latter of these two modes are the following relations, namely,—

a. The relation of the *Usufructuary* and the Naked Proprietor,

b. ,, ,, *Emphyteuta* and the Dominus,

c. ,, ,, *Hypothecarius* and the Dominus:

This latter class of relations is important in Germany for two reasons, namely,—

1. From its connection with *real charges*,

2. From its connection also with *rights of regality*:

The artificial character of this latter class is especially shown in the mode of the transmission of the obligations from party to party, which may even be by Prescription, without the contract or the will of the parties.

But dismissing for the present this latter class, and recurring to the former class, of obligations, namely, to that class in which the relation of creditor and debtor is determined by an event (fait) as distinguished from a thing (chose), it appears that the PARTIES to this relation, may be several on either side of the relation, that is to say, may be *correi*, or persons jointly and severally liable, or jointly and severally entitled, in the obligation.

Now this class of parties, being *Correi Proper*, must be distinguished from other classes of parties which are correi in appearance only or in an imperfect measure only; *e. g.*, they are to be distinguished at the outset from the following two classes of *Correi* of an imperfect or improper species, namely,—

1. From *thieves*, although these are (it is true) severally liable *in solidum*;

and, 2. From *partners*, who may or may not be also *correi*, although they are (it is true) liable in all cases *in solidum*.

§ 16.

Correalitè, or the position of *Correi* Proper, is not the *rule* of obligations but is an *exceptional* feature in them; and as being exceptional, it arises only in one or other of the two following ways, namely,—

either, 1. From the *will* of the parties to the Obligation,

or, 2. From the *indivisible* nature of the Obligation itself;

§ 17.

To consider, in the first place,

Correalitè arising in the former of these two ways, *i. e.* through the *will* (*volontè*) of the parties to the obligation:

There are *five* modes in which this species of correalitè presents itself, namely,—

1. In the *Stipulatio*,—in which case the word *eadem* generally produces it; and in this phase, it holds as well between the principal debtors and princi-

pal creditors as also between their respective accessories, whether *adstipulatores* or *adpromissores*.

2. In the *Expensilatio*,—and the proof that it holds in this case is, that *expensilatio* is put upon a level with *stipulatio* (No. 1.) and treated as being, in this respect, entirely similar with the *stipulatio*, *e. g.* in the following two passages in particular, namely,
   1. Dig. 2. 14. 9,—"Utputà plures sunt rei stipulandi, vel plures argentarii, quorum nomina simul facta sunt, unius loco numerabuntur, quia unum debitum est."
   2. Dig. 4. 8. 34,—"Idem in duobus argentariis, quorum nomina simul eunt."

With reference, however, to the *nomina* of *argentarii*, argentarii being simply such are to be distinguished, for the matter of Correalitè Proper, from Argentarii who are at the same time *Partners* (Socii Argentarii), these latter not being *Correi* Proper, inasmuch as their several liabilities *in solidum* arise not from the essence of the Correal or Quasi-Correal relation, but from considerations of commercial utility simply ;

Thus explain, Auct. ad Her. 2. 13 : "*Id quod argentario tuleris expensum, a socio ejus* rectè repetere possis."

And similarly explain, Dig. 2. 14. 27 : "Tantum enim constitutum est, ut solidum *alter* petere possit" upon the same grounds coupled with the additional ground of *mutuality* :

3. In *other contracts* generally,—Correalitè is expressly stated to be capable of arising in contracts generally, in the two following passages, namely,
   a. As to *debtors*, in Dig. 45. 2. 9, pref., "Eandem rem apud duos pariter *deposui*, utriusque fidem in solidum secutus, vel eandem rem duobus similiter *commodavi* ; fiunt duo rei promittendi, quia non tantum verbis stipulationis, sed et caeteris contractibus, veluti emtione venditione, locatione conductione, deposito, commodato, testamento."

and, *b*. As to *creditors*, in Dig. 16. 3. 1. § 44, "Sed si duo *deposuerint*, et ambo agant, si quidem sic deposuerunt ut vel unus tollat totum, poterit in solidum agere, sin vero pro parte . . . "

That the *Mutuum* even is no exception, may be inferred from two passages in particular, namely,—

Dig. 12. 1. 7 (Ulp.),—"Omnia quae inseri stipulationibus possunt, eadem possunt etiam numerationi pecuniae; et ideo et *conditiones*."

and, Code 4. 2. 5,—"Si non singuli in solidum acceptâ *mutui* quantitate vel stipulanti creditori sponte vos obligastis." (Rescript of Diocletian.)

4. In the *Testamentum*,—in the case of a bequest to two or more;

and, 5. In a Judicial Decision,—when for or against two or more plaintiffs or defendants.

§ 18.

Correalité Proper,—Its effects remain to be considered. Now these effects are

either, 1. Principal, i. e. Universal,
or, 2. Secondary, i. e. Occasional.

1. The *Principal* or *Universal* Effects of Correalité Proper are two in number, namely,—

A. One correal creditor may claim the whole debt from any one of the debtors singly from the rest,

B. One correal debtor may by payment of the whole, extinguish the debt of all.

These two principal effects are expressed in the following passage, namely, Just. iii. 16 (17) 1,—"Ex hujusmodi obligationibus, et stipulantibus solidum singulis debetur et promittentes singuli in solidum tenentur [A.]; in utrâque tamen obligatione una res vertitur: et vel alter debitum accipiendo vel alter solvendo omnium perimit obligationem et omnes liberat [B.]."

But while one correal creditor or debtor may thus by his

conduct affect the others, that conduct to have this effect must amount to a positive act of *com*-mission, and must not rest with the merely negative acts of *o*-mission: thus, *e.g.* one *correus* is not affected by the mere *mora* of his fellow.

2. The *Secondary* or *Occasional* Effects of Correalité Proper are very numerous, and arise in a very various manner: their varieties of origin and of number may be conveniently and properly classified under the following four groups of circumstance, namely,—

I. Equivalents of Payment,—and hereunder are to be placed the following four sub-varieties of this effect, namely,—

1. *Deposit in Court,*—When this act is done by one correal debtor, it is good for and against all the other parties to the correal obligation.
2. *In solutum datio,*—i. e. the giving of something other than money with consent of creditor in lieu of payment: This also is similarly good both for and against all the parties to the correal obligation:
3. *Novatio,*—This also is similarly good both for and against all the persons who are parties to the obligation. But note that *Constitutum* is for this matter to be distinguished from *Novatio,* inasmuch as *Constitutum* is properly a confirmation of the original obligation and is not the substitution of a new obligation for it: The following passage must be so construed, else it is contrary to the true opinion of the general effect;

   Dig. 13. 5. 10,—"Idem est et si duobus reis stipulandi alteri *constitutum,* alteri postea *solutum* est, *quia loco ejus cui jam solutum est haberi debet is cui constituitur.*"
4. *Compensatio,*—i. e. Set-off: This act when done by one correal debtor is not good either for or against the other parties to the correal obligation, unless either, 1. There be a special set-off made in account,

or, 2. There be a partnership subsisting between the *correi.*

II. Agreement of Wills towards the extinction of the debt,—

1. *Acceptilatio,*—This act when done by one *correus* is good both for and against all the others, and that for two reasons, namely,

a. Because this is the natural consequence of that particular species of contract,

and, *b.* Because *acceptilatio* is really a sort of payment,—Dig. 46. 4. 16: "Velut solvisse videtur."

2. *Pactum de non petendo,*—This act when done by one *correus,* may be in either of two forms,—namely,

a. In personam merely,

or, *b. In rem;*

When *in personam* merely, it is not good either for or against the other correi, but is merely personal to the party or parties making it; And even when it is made *in rem,* it is not invariably good either for or against the other parties to the obligation, but the following distinction holds regarding its effect, namely,—

a a. When the *pactum de non petendo in rem* is made by one of several *co-creditors,* it is not good against the other co-creditors,—see Dig. 2. 14. 27,—"Si unus ex argentariis sociis cum debitore pactus sit, an etiam alteri noceat exceptio? Neratius, Atilicinus, Proculus, *nec si in rem pactus sit* alteri nocere; tantum enim constitutum, ut solidum alter petere possit. (Idem Labeo, nam nec novare alium posse, quamvis ei rectè solvatur; sic enim et his qui in nostrâ potestate sunt, rectè solvi quod crediderint, licet novare non possint; quod est verum.) *Idemque in duobus reis stipulandi dicendum est.*"

But, *b b*. When this pactum is made by one of several *co-debtors*, it is good both for and against the other parties to the obligation, the reason being the consequential liability which otherwise would fall upon the co-debtor making it:

3. *Transactio*, or compromise,—This is of a twofold nature,

being, *a*. An actual payment of part of the debt,

and, *b*. A *pactum de non petendo* as to the rest of it.

Now, *a*. So far as it is an actual *payment*, it is good both for and against the other parties to the obligation also;

and, *b*. So far as it is a *pactum de non petendo*, it is good or bad for or against the other correi according to the distinction taken in II. 2. *supra*, regarding the Pactum de non petendo.

§ 19.

III. Incidents of Actions or of Procedure,—

1. *Litis contestatio*, or joining of issue,—This act when done or suffered by one *correus* was good for and against all other parties to the obligation, not excluding sureties even; but a law of Justinian passed in 531 A. D. took from the *litis contestatio* this effect altogether,—

The law is given in Code 8. 41. 28,—"Generaliter sancimus quemadmodum in mandatoribus statutum est, ut contestatione contrà unum ex his factâ alter non liberetur, ita et in fidejussoribus observari . . ."

2. *Jusjurandum*,—This step was good or bad for and against the other parties to the correal obligation when taken by one of them according as it is

either, *a*. *Negative*, or in the words *dari non oportere*, *i. e.* when it is taken by a correal debtor who denies the existence of the debt;

or, *b*. *Positive*, or in the words *dare oportere*, *i. e.*

when it is taken by a correal creditor who affirms the existence of the debt.

3. *Opinion of Judex or Judgment,*—This, when given against one of several correal debtors, is good or bad for and against all the other parties to the correal obligation, according as it is,

either, *a.* A judgment of acquittal,

or, *b.* A judgment of condemnation;

these two judgments having respectively to the Negative and Positive Oaths (jura juranda) above an entire similarity in this respect;

4. *Award of Arbitrator,*—This is purely personal whether imposing a liability or entitling to an advantage, and the party to the correal obligation who refuses to abide by the award is the alone sufferer, unless indeed where the relation of partnership or that of principal and surety subsists between the parties:

5. *Limitation* or *Prescription of Actions,*—This also was purely personal until Justinian's time; but that emperor, by a constitution of his, enacted that the limitation when it was complete for or against one correus should be likewise so for and against all the others, with the exception alone of an *infant,*—See Code viii. 40. 5.

6. *Restitution of Minor,*—This also both was and always continued to be purely personal, and that indifferently whether the infant was the principal debtor or was a surety merely.

IV. Events that are purely accidental,—

1. *Confusio,*—This also is purely personal, unless where some relation of partnership enters involving consequential liability on the partner who is released by the accidental event: see Dig. 46. 1. 71,—"Sed quum duorei promittendi sint, et alteri haeres extitit creditor, justa dubitatio est, utrum alter quoque liberatus est, ac si soluta fuisset pecunia, an persona tantum exemta confusâ obligatione. Et puto aditione haereditatis confusione obliga-

tionis *eximi personam* . . . cum altero autem reo vel in solidum, si non fuerit societas, vel in partem si socii fuerint, posse creditorem agere."

2. Capitis deminutio,—This also is purely personal: see Dig. 45. 2. 19,—"Quum duo eandem pecuniam debent, si unus capitis deminutione exemtus est obligatione, alter non liberatur."

§ 20.

Correalité Improper,—The improper or imperfect instances of correalité now remain to be considered, in their points of contrast and resemblance with Correalité Proper.

Now, first of all, these improper or imperfect instances are so described for the following two reasons, namely,—

1. Because the question of correalité in their case arises only on the passive or debtors' side of the obligation,

and, 2. Because only some of the effects (Principal and Secondary) of Correalité Proper which are enumerated above attach to them even on the debtors' side.

These imperfect or improper instances may be conveniently and properly classified under the following four heads, namely,—

I. Obligations arising out of delicts done or suffered by two or more persons together; and hereunder arise the following two sub-varieties of this obligation, namely,—

1. Obligations in virtue or in consequence of which a Penalty and not merely an Indemnity (Reparation) is sought to be recovered:

In the case of these obligations, the first of the two Principal or Universal Effects of Correalité Proper which are mentioned above, namely, that marked A., is found to apply, but neither the second of those two Principal Effects, namely, that marked B., nor yet any of the Secondary or Occasional Effects enumerated above and classified under the four groups marked respectively I., II., III., and IV.

2. Obligations in virtue or in consequence of which an *Indemnity* merely, and not also a *Penalty*, is sought to be recovered.

In the case of these obligations, the first and also the second of the two Principal or Universal effects of Correalité Proper which are mentioned above, namely, those marked respectively A. and B., are found to apply, as are also all the Secondary or Occasional Effects classified under Group I. above (namely, Equivalents of Payment). But no other of the Secondary Effects classified above are found to apply in the case of this variety of Obligations; at all events, the Secondary Effect indicated above by III. 1, and being the *Litis Contestatio*, is here excluded.

See Dig. 9. 3. 3. § 4: "Si plures in eodem coenaculo habitent, unde dejectum est, in quemvis haec actio dabitur, cum sanè impossibile est scire, quis dejecisset vel effudisset: et quidem in solidum: sed si cum uno fuerit actum, caeteri liberabuntur, *perceptione non litis contestatione*, praestaturi partem damni societatis judicio vel utili actione ei qui solvit." See also Dig. 27. 6. 7. § 4: "Si plures sint qui auctores [falso] fuerunt, *perceptione* ab uno factâ et caeteri liberabuntur, *non electione*."

II. Obligations arising out of certain contracts entered into by two or more persons together, and in virtue or in consequence of which certain collateral effects arise: hereunder are to be classified the following four sub-varieties, namely,—

1. Collateral Obligations arising out of *Emptio Venditio*,
2. Collateral Obligations arising out of *Locatio Conductio*,
3. Collateral Obligations arising out of *Commodatum*,

and, 4. Collateral Obligations arising out of *Depositum*.

In the case of all these four sub-varieties of the imperfect or improper Correal Obligation, there are found to apply the first and also the second of the Two Principal and Universal Effects of Correalité Proper mentioned above and marked respectively A and B; also all that group of the Secondary and Occasional Effects designated Equivalents of Payment,

and marked I.; but no other of the Secondary or Occasional Effects enumerated above and marked respectively II. III. and IV., and most emphatically not the *Litis Contestatio*, being III. 1. supra.

III. Obligations arising out of certain personal duties which are incumbent upon two or more persons together, and in virtue or in consequence of which certain effects resembling the effects of Correalité Proper arise. Hereunder are to be classified the following two sub-varieties, namely,—

1. The relation of *Co-Tutors*,
2. ,, ,, *Co-Mandatores*:

In the case of both these two sub-varieties, and in the case of each of them equally and indifferently, there are found to apply the first and also the second of the two Principal and Universal Effects marked respectively A and B supra, but not in general any of the Secondary or Occasional Effects enumerated above and classified respectively under I. II. III. and IV. And note here that the *actio de rationibus distrahendis* which appertains to the relation of Co-Tutors being the first of the two last-mentioned sub-varieties, although it sounds in double damages (*in duplum*) is nevertheless not a *penal* action.

§ 21.

IV. Obligations arising out of the relation of Principal and Agent, whether the Principal consists of one person or of two or more persons together, namely,—

1. Exercitoria actio,
2. Institoria ,, ,
3. Quod jussu ,, ,
4. Tributoria ,, ,
5. De peculio deque eo quod in rem domini versum est actio:

} Being the so-called *Actiones Adjectitiae Qualitatis* (suits of a superadded nature).

In all these actions, both the principal effects A and B supra apply, also the Particular or Secondary Effects indicated above by III. 1. (litis contes-

tatio), II. 1. (acceptilatio), I. 3. (novatio); nevertheless, the three latter effects follow only if the transaction occasioning them has been transacted with the *agent*-debtor (magister), as distinguished from the *principal*-debtor (exercitor), and not *vice versâ*.

§ 22.

The *Ultimate* Grounds of *Correalité* are now to be stated. Correalité being, as before mentioned, exceptional arises only through the express volonté or *will* of the parties to the obligation (correi) (supposing of course that the nature of the prestation or performance is not itself intrinsically indivisible). Now, the occasions for the exceptional element of correalité in obligations are two, namely,—

1. The Security (sûreté),
and, 2. The Convenience (commodité),

of the Creditor or Creditors who insist upon it as a condition precedent to their contracting at all. For it is clear that the creditor,

(1) is *more secure* by reason of the element of correalité, two debtors being surer than one;
and, (2) is *more conveniently situated* by reason of the same element, inasmuch as he obtains full satisfaction of his debt by means of one action without needing to resort to a great number, (multiplicity) of actions.

Both these two occasions present themselves, it is manifest, in correalité properly so-called; they also, it is equally manifest, present themselves equally in correalité of the improper or imperfect species; so that there is in fact, a practical similarity between the proper and the improper species of *correalité* in these two respects. Each *correus* may be taken to have consented to be the *mandatarius* of the other or others for the whole amount of the debt; nevertheless, each *correus* has an interest of his own in the correal debt, otherwise he is a mere *fidejussor*, and would be dealt with as such. A *correus* need not, however, necessarily be a partner; although, *semble*, partners are necessarily correi,—in

other words, co-*partners* are necessarily co-*parties*, but not *vice versâ*.

§ 23.

The *Remedy Over (Recours)* of one *correus* against another for *contribution* whether of disbursements or of receipts is the next point to be considered, and is a necessary consideration to complete the subject.

Now regarding the existence or not of the Remedy Over (Recours,) there have been two opinions commonly entertained, namely,—

1. The Negative Opinion, that no such remedy over for contribution exists at all as a General Rule in the Correal Relation,
2. The Positive Opinion, that such remedy over does as a General Rule exist in all cases.

These two opinions are extremes, but they approximate to each other through the mutual admission of various exceptions to the assumed general rule :

The first or negative opinion bases itself on this circumstance, namely : That the strict *nature* or *essence* of *correalité* excludes the idea of any remedy over;

The second or affirmative opinion bases itself upon the following considerations,—

1. Correalité is exceptional and unnatural,
2. If there was no remedy over for the ultimate adjustment of the rights of *correi inter se*, there would be a violation of the natural maxim " nul ne doit s'enrichir aux depens d'autrui."
3. It is possible to allow the remedy over, without at the same time interfering at all with the essential nature of correalité ;

Therefore, 4. Why not admit this ultimate adjustment of the rights of the *correi* inter se, by means of the remedy over ? And Savigny admits it accordingly, subject to the ascertainment of the following matter, namely, the dis-

covery of some definite and independent ground of right upon which the remedy over may be based.

Now the discovery of such a ground is to be endeavoured and set about in two ways,

as well, I. By an investigation into *Principles,*

as also, II. By an investigation of *Case-Decisions.*

I. To investigate, Firstly, the *principles* of *law,* with a view to the discovery of the requisite basis :

Taking, 1. The principle of *Partnership* or of the *Actio Pro Socio,*—Does this principle furnish the requisite basis ? Answer: It furnishes indeed a basis that is sufficient for explaining and justifying the remedy over in the case of Partnerships, but the basis which this principle furnishes is insufficient for those other cases of correalité in which no partnership enters, or which arise apart from the express agreement of the parties ;

taking, 2. The relation of the *mandator* to the *mandatarius,*—Does this relation furnish the requisite ground ? Answer:—It supplies indeed a ground which is in general sufficient; but the relation of *correi* who are also on the one hand EXPRESS *mutual cautiones* is cumbrous and rare, (see Dig. 45. 2. 11, Papin., *infra*); and if, on the other hand, the relation of correi merely give rise to an IMPLIED *mutual cautio,* then even here the principle which it furnishes is sufficient to explain only the *contractual* species of correalité, and not those other species which are independent of contract.

taking, 3. The *actio negotiorum gestorum,*—Does this actio furnish the requisite ground ? Answer: Valerius Severus, it is true, accepts this actio as furnishing the true

ground of *recours*: But besides that this action only lay (until at least very recent times), in case of the administration of the affairs of a third party with whom the administrator had neither a common interest nor any privity, this action further assumes that the dominus, or owner of the property is in ignorance of the doings of the administrator,—two reasons which are both of them reversed in the case of the relation of one *correus* to another.

taking, 4. The *Jus cedendarum actionum*,—Does this furnish the true and proper ground? Answer: It furnishes a complete ground of *recours*,—

now, 1. If this cession of actions is *voluntary* on the part of the creditor, and dependent therefore upon his will to make or not to make it, it clearly furnishes no sufficient ground for *recours*, which ought to be invariable on every occasion;

but, 2. If either this *cession* of actions is *compulsory* on the part of the creditor, and it may be made so by means of the *doli exceptio*, so as to be independent of his will,

or, 3. If this *cession* of actions can be *assumed*, and from the time of Antoninus Pius it might be *assumed*, so as to be still more independent of the creditor's will,—

Then in both these two latter cases, and indifferently in either of them, *i. e.*, whether the cession of actions is compulsory or is assumed (*forcée* ou *feinte*), there is a stable basis of right furnished for *recours*:

There is, however, this practical difference between the *compulsory* cession and the *assumed*, that in consequence of the *assumed* cession, a *utilis actio* is furnished, and the paying debtor who avails himself of it for the purpose of *recours* sues *suo nomine*, whereas in consequence of the *compulsory*

cession, the paying debtor sues *mandatis actionibus*, or as one *in rem suam procurator factus*.

The critical time at which it is determined whether a *cession* of actions may be *assumed* or not, is the time at which the paying debtor might (if he might) have compelled a cession of the actions; and if at that time the cession might have been made, it may at any subsequent moment be assumed as made, no matter when the necessity for doing so arises, and notwithstanding any obstacle which may have meanwhile arisen to the cession being then actually made. Nevertheless this right of cession (whether it be *compulsory* or *assumed*), is paralysed wherever some immorality is at the base of the relation, so that in such a case there is neither any *actio pro socio* nor any *actio utilis* available: but of course if the creditor makes a *voluntary* cession, than even in such a case the paying debtor may use the remedy over.

§ 24.

II. To investigate, Secondly, the *case-decisions*, with a view to the discovery of the requisite basis:

The *Case-Decisions* in the matter are of three varieties, namely, 1. Cases of Imperfect or Improper Correalité,—and thereunder the following two sub-varieties, namely,—

a. The case of *Co-Tutors*, when one is made liable for the act of the other or others, and that one has been guilty on the one hand,

aa. Of *culpa* merely, he may after paying the whole have a remedy over against his co-tutor or co-tutors for contribution as against the latter,—see this case in Dig. 27. 3. 1. § 13,—"Et si forte quis ex facto alterius tutoris condemnatus praestiterit . . . . utilem actionem tutori adversus contutorem dandam."

But if the one who has been compelled to pay the whole has on the other hand been guilty

bb. Of *dolus* also, then, as being himself *particeps doli*, he may not even after paying the whole, have any remedy over against his co-tutor or co-tutors; see this case in Dig. 27. 3. 1. § 14: "Planè si ex *dolo* communi conventus praestiterit tutor, neque mandandae sunt actiones neque utilis competit . . ."

In case *aa*, or where there is *culpa* merely and not also *dolus* on the part of the paying tutor, the cession is both possible and effectual, and that for one or other of the two following reasons, namely,

either, 1. Because the cession was possible at the date of the critical time for determining the possibility or impossibility of it, as above defined;

or, 2. Because the payment which is made in whole is in a manner the purchase money for the actions.

Now it is this *cession* of actions and not (as Valerius Severus supposes) the actio *negotiorum gestorum* which is the foundation of the remedy over in the case of *co-tutors*.

b. The case of Common *Tort-Feasors*,—with reference to whom a distinction similar to that stated above in the case of *Co-Tutors* has been drawn, and a remedy over (*a*), has been allowed in the case of a *tort* originating in *culpa* merely, and (*b*), has been disallowed in the case of a *tort* originating in *dolus*.

2. Cases of *Passive Correalité Proper*,—and thereunder the following three sub-varieties, namely,—

a. The case of the *Stipulatio*,—with reference to which the existence of a remedy over may be inferred from the following passage, namely, Dig. 21. 2. 65,—"Nec remedio locus esse videbatur, ut per doli exceptionem actiones ei qui pecuniam

creditori dedit praestarentur, *quia non duo rei facti proponuntur*, sed familiae erciscundae judicium eo nomine utile est."

b. The cases of the contracts *Emptio Venditio* and *Locatio Conductio*,—with reference to which the existence of a remedy over may be conclusively inferred from the following two passages, namely,

(1.) A passage of *Marcellus*, Dig. 19. 2. 47,—"Cum apparebit emptorem conductoremve pluribus vendentem vel locantem singulorum in solidum intuitum personam . . . . electionem conveniendi quemvelit non auferendam actori, *si actiones suas* adversus caeteros praestare non recuset."

and, (2.) A rescript of the emperors Valerien and Gallien,—

Code iv. 65. 13,—"Si omnes qui conducebant in solidum locatori sunt obligati, jus ei competens conveniendi quem velit non debet auferri. Habetis sane vos facultatem locatori offerendi debitum; et ut transferantur in vos ea quae ob hanc conductionem ab his quorum nomine inquietamini obligata sunt postulandi."

In the first of these two passages, Marcellus merely says that the creditor MAY (not that the creditor *must*) be compelled by the debtor to make an actual, as distinguished from an *assumed*, cession.

c. The case of *Mutuum*,—with reference to which the existence of the remedy over is expressly stated in the Rescript of the

emperors Diocletien and Maximien which is given in Code 8. 40. 2.—"Creditor prohiberi non potest exigere debitum, cum sint duo rei promittendi ejusdem pecuniae a quo velit, et ideo si probaveris te conventum in solidum exolvisse, Rector Provinciae juvare te adversus eum cum quo communiter mutuam pecuniam accepisti non cunctabitur."

The rescript contained in the last quoted passage must not be taken as a new enactment; on the contrary, it is merely declaratory of the existing and accustomed law upon the subject. It is possible even (although it is by no means a necessary assumption, as some think), that this particular rescript may have had exclusive reference to *partnership*, inasmuch as the terms *communiter* and *communio* occur somewhat pointedly in it.

3. Cases of Active Correalité Proper,—and thereunder the following three cases, namely,
   - *a.* The case of Partnership,—with reference to which the remedy over is admitted;
   - *b.* The case of Mandate,—with reference to which also the remedy over is admitted;
   - and, *c.* The case of a Cession of Actions (whether compulsory or assumed),—the remedy over in this case may also be taken to be a matter beyond doubt, although there is a wonderful paucity of passages in support of it.

General Résumé of foregoing investigation regarding the existence or not of the Remedy over (Recours),—

1. In the case of *Partnership* subsisting between the parties to the correal obligation, the right to the remedy over rests as well in its passive as in its active side upon the basis of the partnership itself;
2. In a limited number of cases of correal obligation, the right to the remedy over is based as well in its passive as in its active side upon the existence of

a mandate (express or implied) from one or some of the parties to the other or others;

3. In the great majority of cases of the correal obligation (proper and improper), the right to the remedy over (in respect however of its passive side alone) finds its basis in the cession of actions (whether compulsory or assumed),

and, 4. By one or other or all of these means and in consequence of them, the correal obligation ceases to be a game of chance, and becomes a debt falling equally on all.

but, 5. The remedy over is invariably excluded in cases of fraud *(dolus)* on the part of the person claiming it.

The *Practical Value* of *Correalité* remains next to be considered: It is best illustrated by a succession of instances.

Thus, 1. In the case of one correal debtor making *payment* of the whole, all the solvent *correi* are ultimately made to contribute to the payment equally with him;

2. In the case of one correal debtor making an *acceptilatio* of the whole, all the other *correi* are discharged; the question therefore is of no importance here;

and, 3. In the case of one correal creditor making a *pactum de non petendo*, the other co-debtors are not affected, unless the relation of partnership should subsist between the correal debtors, in which case the ultimate share of their respective liabilities will depend upon the terms of their partnerships.

§ 25.

Certain particular texts of more than average importance and of corresponding difficulty remain to be explained, namely,—

1. The *Passage of Papinian,—Dig.* 45. 2. 11.,—Reos

promittendi vice mutuâ fidejussores non inutiliter accipi convenit. Reus itaque stipulandi actionem suam dividere si velit (neque enim dividere cogendus est) poterit eundem ut principalem reum, item qui fidejussor pro altero constitit, in partes convenire; non secus ac si duos promittendi reos divisis actionibus conveniret.

The effect of this passage is,—that in the circumstances stated in the passage a common creditor may at his discretion sue any one co-debtor for the whole debt, and that either

1. As a principal debtor only,

or, 2. As being in part a principal debtor, and in part a secondary or subsidiary one:

But Papinian merely says that this combination is possible; he by no means says that it is either necessary to, or usual in, correalité.

2. The *Passage of Ulpian*,—Dig. 35. 2. 62: "Quod si societas inter eos nulla fuisset, *in pendenti esse* in utrius bonis computari oporteat id quod debetur vel ex cujus bonis detrahi." Ulpian here means (as Julian before him meant) that in case of no-partnership existing between the *correi*, the occurrence of a correal debt or credit amongst the liabilities or assets of a deceased person could not be finally disposed of by the executor excepting in the future; and Ulpian in distinguishing the case of no-partnership from the case of partnership is referring merely to the difference in the degree of certainty with which the ultimate liability or advantage attaches to the deceased's estate in the two cases, the certainty in the case of partnership being absolute, and in the case of no-partnership being merely contingent.

3. *Four passages* which distinctly predicate the absence of the *remedy over* as between *co-sureties*, the one against the other or others:

1. Justin. III. 22. 4. — "Sed ex epistulâ Hadriani compellitur creditor a singulis

qui modo solvendo sint litis contestatae tempore partes petere . . . . sed et si ab uno fidejussore creditor totum consecutus fuerit, hujus solius detrimentum erit, si is pro quo fidejussit, solvendo non sit; et sibi imputare debet, cum potuerit adjuvari ex epistolâ divi Hadriani."

2. Gaius III. 122,—" Sed ut ex suprà dictis apparet, is a quo creditor totum petit, poterit ex epistulâ divi Hadriani desiderare, ut pro parte in se detur actio."
3. Dig. 46. 1. 39,—" Ut fidejussor adversus co-fidejussorem suum agat, danda actio non est."
4. Code 8. 41. 11. (being a Rescript of Alexander),—" Cum alter ex fidejussoribus in solidum debito satisfaciat, *actio ei adversus eum qui unà fidejussit, non competit.* [Potuisti sanè, cum fisco solveres, desiderare ut jus pignoris, quod fiscus habuit, in te transferretur: et si hoc ita factum est, *cessis actionibus* uti poteris. Quod et in privatis debitis observandum est,—(*nempe adversus principalem reum.*)]"

These passages, while they affirm the absence of the remedy over (recours) as between co-fidejussores, also explain that absence upon the ground of a particular enactment, to wit, the epistula Hadriani, which had peremptorily excluded it, and which had substituted for it a divided liability within the competence of the party defendant to demand.

The concluding part of the Rescript of Alexander, being that part of the 4th passage quoted above which is enclosed within the square brackets,—seems at first sight to be contradictory to the common opinion as expressed in the three other passages and in the prior part of the 4th passage itself; but this apparent inconsistency is explained by the circumstance that the ceded actions referred to in the passage within the square brackets are the actions which are available against the principal debtor primarily on the

part of the principal creditor and secondarily on the part of the paying surety. To all such actions the paying surety is of course entitled, as also and *a fortiori* to any security (*pignus*) held by the principal creditor.

The true conclusion to be derived from these four passages is therefore the following,—

Not, 1. That in general *correi*, who are simply such, have no remedy over, the one of them who pays against the other or others of them who have not paid;

but, 2. That in particular *co-fidejussores* have no such remedy over against each other; and for the exclusion of this remedy in this particular instance, there are (besides the statutory reason already indicated by the passages in No. 3.) the two following reasons, namely,—

a. There is no immediate relation of law at all between *co-fidejussores*, who may not even be aware of each other's existence;

and, *b*. Each *co-fidejussor* is a *correus* in respect only of the principal debtor, and not also in respect of his co-fidejussors.

§ 26.

The 99th Novel of Justinian: or the *Beneficium Divisionis*: The material part of this Novel is the following,—

"Si quis enim *alternâ fidejussione* obligatos sumat aliquos . . . . si vero aliquid etiam tale adjiciatur [et unum horum in solidum teneri] servari quidem pactum; non tamen mox ab initio unumquemque in solidum exigi, sed interim secundum partem quâ unusquisque obligatus est . . . . si quidem idonei sint et praesentes inveniantur, illos periclitari complere (singulos in propriâ parte) quod sub alternâ promissione creditum est (aut ex quo omnino obligati sunt) et non commune debitum proprium cujuspiam fieri onus . . . . Sin autem in iisdem commorentur, utrique aut omnes, locis, sancimus negotii judicem deducere illos mox et communiter examinare negotium, communiter autem inferre sententiam."

The effect of this novel was to establish in the cases to which it applied a division of liability (the 4th Novel having already established the order of liability or Beneficium Excussionis, Ordinis, or Discussionis, as it was variously called):

The cases to which the 99th Novel properly refers are,—

Not, 1. (As some imagine) the cases of simple sureties (co-fidejussores), in which case it would have been (it is supposed) to them what the *lex Furia* was to Sponsores and Fidepromissores;

nor, 2. (As others imagine) The cases of simple correi, in which case it would have been (it is supposed) to them what the 4th Novel was to sureties;

but, 3. (As Savigny says and as the text itself also says) The cases of *correi* who are at the same time mutual sureties *(alternâ fidejussione obligati)*.

§ 27.

Correalité in Modern Law.

1. In the Law of Germany,—*divided* liability is the rule, and *correal* liability is the exception. Of the *sources* of correalité, the verbal and the literal have disappeared. Of the *effects* of correalité, the majority are the same; nevertheless the customary effects of the *acceptilatio*, the *litiscontestatio*, and the *novatio* have disappeared. And with reference to cases of Imperfect Correalité,—These remain precisely as they existed in Roman Law; moreover, the following new cases of correalité have arisen in modern times, namely,—

1. The cases of *Industrial* Associations,—each member of these being liable *in solidum*,

and, 2. The cases of *Letters of Exchange*,—the bearer of these having his remedy *in solidum* against the drawer, the acceptor, and the whole succession of indorsers:

2. In the law of Prussia,—some differences have been made,—Thus, by the Landrecht, all the creditors must join in suing; also, one creditor cannot prejudice the rights of the others; moreover, all debtors are liable each as a general rule *in solidum*, and only *exceptionally* for a part merely:

Any debtor paying the whole has a remedy over against the other debtors, until ultimately all the *solvent* correal debtors are made liable equally; And, again, in the cases of imperfect correalité, any one tortfeaser paying the whole has his remedy over against the others in case of *culpa* merely, but he has no such remedy over in case of *dolus:* nevertheless, even in this latter case (that of *dolus*), the person injured obtains only reparation of the injury (indemnité), the amounts subsequently recovered from the other tortfeasors who are participators in the common *dolus* going into the chest for the poor.

3. In the law of France,—there is a general agreement with the Roman Law. Thus, *divided* liability is the rule, and *correal* liability is the exception. And with reference to the *effects* of *correalité,* these are absolutely the same, except in the following respects, namely,—1. The *Serment Negatif* releases the debtor only to the extent of the share of the particular creditor who tenders the oath; also, 2. The *Pacte de Remise* releases the debtor only to the extent of the share of the particular creditor with whom it is made, although of course, 3. The *Pacte de Remise* will absolutely extinguish the whole debt when it is made with a common creditor, as distinguished from one of several co-creditors: Lastly, 4. The *confusion* extinguishes the debt only to the extent of the share of the individual debtor.

4. In the law of Austria, there is a perfect agreement with the Roman Law, both, 1. As regards the nature, and, 2. As regards the effects (both immediate and ultimate) of the correal obligation.

§ 28.

D. The Object or Content of the Obligation.

This object consists of *Actes Isolées,* affecting the liberty of the debtor. The content of the Obligation consists in the performance *(praestation)* of these acts. Hereunder accordingly have to be considered the following points relative to *Prestations,* namely,

1. The Nature of the Prestation,
2. The Place of the Prestation,

and, 3. The Time of the Prestation.

1. The Nature of the Prestation,—This subdivides itself into a consideration of the following five contrasted varieties of Prestation, namely,

a. Positive as opposed to *Negative* Prestations,

b. Momentary ,, *Continuous* ,,

c. Divisible ,, *Indivisible* ,,

d. Possible as opposed to *Impossible* Prestations:

and, *e. Determinate* ,, *Indeterminate* ,,

a. Positive as opposed to *Negative* Prestations,—These are respectively *Acts* and *Forbearances*.

As examples of *Negative* Prestations, the following five may be instanced, namely,—

1. The not preventing another in the exercise of his right of way;
2. The forbearing from fraud or deception *(dolum abesse)*;
3. The forbearing from further litigation *(amplius non agi)*;
4. The surrender by one riparian proprietor of the entire right of fishing to his neighbour;

and, 5. The abstinence of one trader from carrying on his trade within a particular district.

As examples of *Positive* Prestations, the following two may be instanced, namely,—

1. A *giving (dation, dare)* whether of the thing itself or of its use;
2. A *doing (fait, facere)* whether manual *(opus)* or legal (*cautio*).

The technical words used by the Roman lawyers, for the purpose of describing Prestations, are the following three, namely,—

1. *Dare,* 2. *Facere,* and, 3. *Praestare.*

It is a mistake, however, to suppose (as many do), that the words *dare* and *facere* are opposed to each other; for the latter word often, in fact, includes the former, *e. g.*, in the following passage,—

Dig. 50. 16. 218,—"Verbum *facere* omnem omnino faciendi causam complectitur, *dandi*, solvendi, numerandi, judicandi, ambulandi:"

The three words, *dare, facere, praestare,* are also frequently run indiscriminately together, *e. g.,* in the following passage,—

Dig. 44. 7. 3. pref.,—"Obligationum substantia . . . . in eo consistit ut alium nobis obstringat ad *dandum* aliquid vel *faciendum* vel *praestandum.*"

b. Momentary as opposed to *Continuous* Prestations,—

The true distinction between these is the following one, namely,

that, 1. In *Momentary* prestations, time is an immaterial element,

whereas, 2. In *continuous* prestations, time is an essential element.

The *time* which is of the essence of Continuous Prestations may be of the following qualities, namely,—

either, 1. *Limited,*—

and that either, 1. By some fixed period,

or, 2. By some event which must, however some time or other happen:

or, 2. *Unlimited,*—

and that either, 1. As being *Perpetual,* that is, certain not to end or determine;

or, 2. As being *Indefinite,* that is, determinable by some event, which may, however, possibly never happen.

§ 29.

c. Divisible as opposed to *Indivisible* Prestations.

For the due consideration of this variety of prestations, it is necessary to consider the relation generally of whole to part and of part to whole. Now whole is related to part in either of two ways, that is to say, according as—

1. The whole is regarded as *fractioned,*

or, 2. The parts are regarded as *totalled:*

This twofold variety of the relation of whole to part, applies as well, 1. To *Things,* as 2. To *Rights.*

Regarding this relation in each of these its varieties, and as it applies A. To *Things,* and according as the whole is regarded,

1. As *fractioned* or *fractionable* on the one hand,—
or, 2. As *totalled* or *aggregated* on the other:

1. Where the whole is regarded as *fractioned* on the one hand, the division and divisibility of things,

a. Being on the one hand *Immoveables*,—is merely *intellectual* and not *real*; it is also *unlimited*, with this one exception, that land which has been built upon, presents a limited divisibility only;

and, *b*. Being on the other hand *Moveables*,—is more than *intellectual* merely, and is *real* also, being divisible into *physical unities*, which are either *Natural* or *Artificial*. These *unities* admit, however, of no further division, but are themselves indivisible, without at least either, 1. Destroying the idea of the whole, or, 2. Diminishing the value of the aggregate of the parts.

2. Where the whole is regarded on the other hand as *totalled* or *aggregated*,—

Here, the aggregation (and with it therefore also the division) of things

a. Being on the one hand *Immoveables*,—is merely *intellectual* and not also *real*,

and, *b*. Being on the other hand *Moveables*,—is merely *artificial*, as *e. g.* in the case of a *flock of sheep*.

Quantities admit more readily than other things both modes of divisibility, whether that of fractionment or that of totalment or aggregation.

§ 30.

Again, regarding the relation of whole to part in each of its varieties mentioned above, and as it applies B. To Rights, and according as these rights (being the so-called *jura rerum*) relate to and comprise,

either, 1. Res strictly so-called,

or, 2. Obligationes being res less strictly so-called.

Firstly, 1. Where it has reference to RES STRICTLY SO-CALLED.

Here, *a*. With reference to Property or Ownership *(dominium)*, in the case of communio or joint proprietorship, either, 1. Existing from the beginning, or, 2. Arising from some subsequent event, no one owner is entitled *in solidum* but on the contrary each is entitled *pro parte* only, as appears from the following two passages (among others),—

1. Dig. 45. 3. 5,—"Servus communis sic omnium est, non quasi singulorum totus, sed pro partibus utique indivisis, *ut intellectu* magis partes habeant quàm corpore."

2. Dig. 13. 6. 5. § 15,—"Et ait duorum quidem in solidum dominium vel possessionem esse non posse."

Moreover, these distinctions apply to all kinds of ownership,

whether, 1. Quiritary (ex jure Quiritium),
or, 2. Bonitary (in bonis),
or, 3. Possessory (bonae fidei possessio).

The various modes of ending undivided ownership are the following, namely,—

1. Succession of one to others,
2. Joint alienation of all to 3rd person,
3. Physical division and mutual exchange,

and, 4. The act of the parties assisted by the act of the Judge.

The customary technical expressions in Roman Law for joint ownership or property are,—

Partes pro indiviso, and *communio pro indiviso*, } —these being the more correct expressions;

also, *Partes pro diviso*, and, *communio pro diviso*, } —these latter expressions being less correct. They were introduced by one Servius and latterly gained acceptance.

Again, *b*. With reference to *Possessio*,

and, *c*. With reference to *Emphytensis*,

and, *d.* With reference to *Superficies,*

and, *e.* With reference to *Ususfructus,*—

In all these four matters the principles which are enumerated above as applying to Property strictly so called, apply also to these in all respects.

But, *f.* With reference to the *Predial Servitude,*

and, *g.* With reference to *Usus,*—

These and each of them are and is absolutely indivisible both physically and intellectually, so that each dominant owner has in fact and necessarily a title *in solidum* in himself individually.

§ 31.

Secondly, 2. Where the relation of whole to part has reference to OBLIGATIONES or RES IMPROPERLY SO CALLED:—

Here, the parts are like the parts in property (dominium), or generally like the parts in *Res strictly so called;* but *Obligationes* are unlike *Res strictly so called* in this respect, namely, that whereas the latter in some instances admit of *continuous indivision,* the former (*i. e.* Obligationes) are incapable of *continuous indivision,* the sum of the several performances (praestations) in the case of Obligationes making up the entire performance of the obligation. The divisibility of the obligation is therefore one of *fractionment* alone.

Considering therefore in detail the signification of the term divisibility as it applies to particular cases of obligations, that is to say, considering it under the three following heads, namely,—

1. Where one creditor and one debtor are alone concerned in the obligation:

Here, either party, whether creditor or debtor, may equally divide the obligation by partial acceptance or by partial discharge: and in particular,

a. The creditor may do so as a matter of course,

and, *b*. The debtor also may do so for the two following reasons, namely,—

1. Because interest runs for the whole amount of the obligatio while any part of it is owing;

and, 2. Because the security also remains while any part of that amount is owing.

Again, 2. Where two or more creditors and one debtor figure in the obligation:

Here, division is the rule, and indivision is the exception, as is also mentioned in connection with *correalité, supra.* The division of the obligatio under this head, may be produced in one or other of the following four ways:—

either, 1. By means of the *Stipulatio,*

or, 2. By means of the *Consensual Contracts,*

or, 3. By means of a *last will and testament,*

or, 4. By means of the *Stipulatio* of *Slaves.*

Lastly, 3. Where two or more representatives of one creditor or of one debtor figure in the obligation, as *e. g.* where an inheritance (Haereditas) of one dying descends upon co-haeredes. In such a case, there instantly springs up *ipso jure* a joint ownership of all the *res strictly so called* appertaining to the Haereditas, and also a several ownership of all the *credits and debits* appertaining thereto. This result may be traced in the XII. Tables even.

The prestation (performance) of the *obligatio* is to be distinguished from the prestation (fulfilment) of the *condition* thereof: Thus, the performance of the latter is not divisible like the obligation, but is altogether indivisible,—see Dig. 45. 1. 85. § 6,—"Si ita stipulatus sim, si fundum

non dederis, centum dare spondes? Sola centum in stipulatione sunt, in exsolutione fundus." The necessity of making this distinction is all the greater, as the prestation of the condition sometimes assumes the appearance of the prestation of the obligation, as *e. g.* in Dig. 44. 7. 44. § 6,—"Sed si navem fieri stipulatus sum, et si non feceris, centum: videndum utrum duae stipulationes sint, pura et conditionalis, et existens sequentis conditio non tollat priorem: an vero transferat in se, et quasi novatio prioris fiat? Quod magis verum est." Of course in this latter case also, the prestation being in reality that of a *condition* and not of an *obligation* strictly considered, is absolutely indivisible, and must be entire if at all. And with reference to the penalty in such a case, the penalty for breach of the condition, although it is usually *alternative*, may by an express effort of the *volonté* to the contrary be made *cumulative* with the prestation. Furthermore, the same penalty, as a general, if not invariable, rule, is divisible, because that is really and truly the obligatio in such case, but the condition remains indivisible as before: see Dig. 45. 1. 4. § 1,—"Ab omnibus haeredibus poenam committi *pro portione haereditariâ*." Also Dig. 45. 1. 85. § 5,—"Sed unicuique *pro parte haereditariâ* praestatio injungitur."

§ 32.

As has been already stated, the divisibility of the obligatio is the rule, its indivisibility is the exception. Nevertheless, the exceptional case of the indivisibility is very far from being infrequent; its occurrence is more or less frequent in the three several groups of obligatio which follow, namely,—

1. The *Dandi Obligatio*,—The one instance of the indivisibility of the obligatio in this group of obligations in the *Predial Servitude*, whether that obligation be created by *Stipulatio* or by the Consensual Contract of *Sale*.
2. The *Faciendi Obligatio*,—With reference to this group of obligations, the following text, viz., Dig. 45. 1. 2.,—"Stipulationum quaedam in *dando*, quaedam in *faciendo* consistunt, et *harum*

omnium quaedam partium praestationem recipiunt . . . . quaedam non recipiunt,"—This text has strangely been made the basis of an opinion to this effect, namely, that the word *dare* refers exclusively to the *divisible* and the word *facere* to the *indivisible* classes of obligations. But this opinion is altogether unfounded in itself and unsupported by the particular passage quoted.

For, 1. The words *dare* and *facere* are in fact much too slightly distinguished from each other for any such purpose,

and, 2. The old Roman lawyers based the distinction in question on the nature of things, as appears from the following (among other) passages,—

1. Dig. 10. 2. 25. § 9,—Talis stipulatio per legem XII. Tab. non dividitur; *quia nec potest.*
2. Dig. 35. 2. 80. § 1,—"Quae *dividuitatem* non recipiunt."

It becomes necessary, therefore, to consider the question of the divisibility or indivisibility of the *Faciendi Obligatio* as well, 1. upon principle, as also, 2. upon decided cases.

Firstly, 1. Considering the question upon *Principle*, and with reference to the four following heads, namely,—

a. With reference to the construction of an *Opus*, or *Work*, as *e. g.* a bath, a theatre, or a race-course. This variety of the *Faciendi* Obligatio is from the very nature of the thing indivisible, as it is only upon completion that the work becomes what it is, see Dig. 35. 2. 80 § 1, *supra.*

b. With reference to *Quantitative Work*, as *e. g.* so many days' labour or so many weeks of work,—this variety of the *Faciendi* obligatio is as absolutely divisible as that of the 1st head is absolutely indivisible.

c. With reference to some *Legal Duty* incumbent upon a *Haeres*, which through his death leaving it unperformed devolves upon two or more *co-haeredes* to perform,—This variety of the *Faciendi* Obligatio is divisible among the co-haeredes, who must each contribute a proportionate part to the discharge of the duty whatever it may be, to the effectuation, *e.g.* of the gift of liberty to a slave.

and, *d.* With reference to the Obligatio to make a *Traditio*, being in fact a sub-variety of the 3rd head of this species of obligations,—That also is a divisible obligation. But in this instance, the divisibility of the obligation is much disputed. The question is twofold, and distributes itself into the following two simpler questions, namely,—

1. Is *Traditio* a *facere* at all?

and, 2. If it is a *facere*, is it *indivisible?*

Now, A. Under the old law,—The *traditio* of a *res nec mancipi* on the one hand was a *dare* and not a *facere* at all: in that case, therefore, the divisibility of the obligatio may be, and is, admitted. But on the other hand the traditio of a *res mancipi* was a *facere* and not a *dare;* and yet even in this case also, the divisibility of the obligatio must be admitted, and that for the three following reasons, namely,—

1. The possession or property which it passed was in its own nature divisible;
2. The ancestor's obligation to make a *traditio* divided itself among his *co-haeredes;*

and, 3. It is entirely arbitrary to say of *dare* that it is divisible, and to deny the same of *facere*, more especially as the two words were in fact frequently applied to the same act, without much (if any) distinction, as *e. g.* in the following passage, namely,—

Dig. 45. 1. 137 § 3,—"Sicut liberatur qui se *daturum* spopondit, si quandoque *tradit.*"

Again, B. Under the modern law, viz., that of Justinian,—The *traditio* was clearly divisible, because it was then become equivalent to *mancipatio*, and therefore to an actual *datio*. It is true that the text of Ulpian in Dig. 45. 1. 72. pref.,—"Stipulationes non dividuntur earum rerum quae divisionem non recipiunt, veluti viae, itineris, aquae, aquaeductus, caeterarumque servitutum. *Idem puto et si quis faciendum aliquid stipulatus sit*,—ut putà *fundum tradi* vel fossam fodiri, vel insulam fabricari, vel operas, vel quid his simile: horum enim divisio corrumpit stipulationem,"—It is true that this passage apparently conflicts with the opinion before expressed that the *faciendi* obligatio of making a *traditio* is divisible; but then the text is really explainable in entire accordance with that opinion, if it be assumed (and it may reasonably be assumed) that a *penal* clause "*nisi fundum dederis*" is implied in it, whereby of course what appears to be an *obligation* would become converted into the *condition* rather of one, which would explain its

indivisibility according to the distinction already taken above between what lies in the Obligation Proper, and what lies in the Condition of the Obligation.

3. The *Non-Faciendi* Obligations,—With reference to this third group of obligations, the Roman lawyers admitted the divisibility of the obligation in some cases of it (*facta quae divisionem recipiunt*) and denied that divisibility in other cases (*facta individua.*) The distinction which they took in this respect in general coincides with the distinction of forbearances into the following two classes, namely,—

a. Forbearances which were *legal*,—all of these being invariably divisible;

and, *b.* Forbearances which are *non-legal*,—all of these being as invariably indivisible.

In the case, however, of both classes of Forbearances, the distinction,—so far was it from being arbitrary,—depended on natural circumstances and natural considerations.

The three following acts were commonly but improperly classed by the Roman lawyers with *Indivisible* Acts, namely,—

1. The gift of a horse not being specific,—or the gift of the one or other of two alternative objects: In such a case, there may be a divided prestation, subject only to this qualification, that the discharge of either party or part remains uncertain until the whole prestation is completed.
2. The *duplae stipulatio*,—or cove-

nant against eviction. In the case of this obligatio, the debt which is the true content of the stipulatio is divisible, and it is the warranty alone that is indivisible.

3. The procedure in an action at law, where the plaintiff in the action, dying after the *litis contestatio*, left two or more *co-haeredes*: In this case, the indivisible character of the act is the consequence of Procedure merely.

§ 33.

To resume the practical results of the foregoing investigation relative to the Indivisible Obligation, it appears,—

That, 1. Where there is only one person (whether creditor or debtor) on each side,—in such a case, there must be an entire discharge, if there is to be any discharge at all.

and that, 2. Where there are several persons (whether creditors or debtors) on either side,—whether they have been several from the first or have not become so until afterwards, as *e. g.* from one original creditor or one original debtor predeceasing and leaving *co-haeredes*, in such a case, and in both phases of it (*i. e.*, as well in the 1st as in the 2nd phase of it), the rule of divided liability is inapplicable, and correalité from being an exception seems to have become the rule.

Now is this really so,—Has *correalité* here become the rule? This is the question which now remains to be examined and resolved.

The first of the two phases of the 2nd variety of the indivisible obligation, that is to say, where there have been *from the first* several parties to the obligation on either side, is

of much rarer occurrence than the second of these two phases; it does, however, occasionally arise. Thus, it arises somewhat commonly under the last wills of deceased persons; there is also one instance of its having arisen in virtue of a contract, namely, in Dig. 8. 3. 19, where Paul mentions it in the case of the creation of a Predial Servitude by the joint stipulation of the two co-owners of an immoveable. This phase of the indivisible obligation was, however, in general avoided, at the same time that its *effect* was secured, in one or other of the two following modes, namely,

either, 1. By an *in jure cessio*,

or, 2. By a *correal obligation*,—

two modes, both of which were applicable to the creation of a Praedial Servitude,

The second of the two phases of the second variety of the indivisible obligation, namely, that in which there having been at the 1st only one party to the obligation on either side of it, he deceasing, two or more *co-haeredes* succeed into his place in the obligation,—This second phase is in effect a true and not infrequent case of Correalité Proper: see Dig. 50. 17. 192,—"Ea quae in partes dividi non possunt, solida a singulis haeredibus debentur."

It was customary to adopt one or other of the following devices in order to avoid the practical difficulty which attended the indivisible obligation, namely,

either, 1. To appoint a single attorney (procurator) to act for both parties in common;

or, 2. To treat the indivisible obligation *as* a correal one;

or, 3. To suppose a pecuniary condemnation or penalty in the place of the Obligation Proper.

§ 34.

Secondly, considering the question of the Indivisibility of the Obligation,

2. Upon the *decided cases*, and hereunder considering,—

A. The cases in which the plurality of persons (whether such plurality has existed from the first or has arisen subsequently) is

on the side of the *debtors* alone, who of course sustain no prejudice by the division or indivision.

Here, 1. In the obligation of the *Predial Servitude*, (being the one indivisible variety of the *Dandi* Obligatio),—each co-haeres of one original debtor is bound *in solidum*; as is also each original co-debtor.

2. In the obligation of the *Opus*,—(being the one indivisible variety of the *Faciendi* Obligatio),—each co-haeres of one original debtor as also each of two or more original co-debtors is bound in solidum: see Dig. 45. 1. 72. pref.,—"Stipulationes non dividuntur earum rerum quae divisionem non recipiunt, veluti viae, itineris, actus, aquaeductus, caeterarumque servitutum. Idem puto et si quis *faciendum* aliquid stipulatus sit, ut putà fundum tradi, vel fossam fodiri, vel insulam fabricari, vel operas, vel quid his simile; horum enim divisio corrumpit stipulationem." And with reference to the passage which immediately follows here in the digest, being the following passage of Celsus in which he cites Tubero, namely,—"Celsus tamen . . . . refert, Tuberonem existimasse, ubi quid fieri stipulemur, si non fuerit factum, pecuniam dari oportere; ideoque etiam in hoc genere dividi stipulationem. Secundum quem Celsus ait posse dici, juxta aestimationem facti dandam esse petitionem,"—the true explanation of the passage is the following: Ulpian appends it to his own opinion as given in the previous passage, not as adopting it but merely as considering it a

"scientific curiosity and an error." It is therefore unnecessary to explain the passage of Tubero as Donellus (Doneau) does; in fact, Donellus's interpretation is erroneous, for he says that the stipulation for the *opus* strictly so considered, although it is originally indivisible, yet becomes divisible upon the penalty for the non-performance of it being incurred,—an opinion which is contrary to the express authorities, and more particularly to the following passage, namely,—

Dig. 45. 1. 85. § 2,—"Quia operis effectus in partes scindi non potest."

Dig. 35. 2. 80. § 1,—"Quaedam legata divisionem non recipiunt . . . Sed et si opus municipibus haeres facere jussus est, individuum videtur legatum: neque enim ullum balineum, aut theatrum, aut stadium fecisse intelligitur, qui ei propriam formam quae ex consummatione contingit, non dederit. Quorum omnium legatorum nomine, etsi plures haeredes sint, singuli in solidum tenentur."

Moreover, it is absurd that debtors failing in performance should be better situated relatively to the obligation than debtors who are faithful to their duty, which they would be, if Doneau was right.

Lastly, 3. In the obligation of the Indivisible Forbearance or the *Non-Faciendi* Obligatio,—Here each is bound in solidum, but through the effect of the remedy over (recours) the penalty is eventually sustained by that one alone of the debtors who is the offending party.

And with reference to all these three classes of indivisible obligations regarded from the side of the debtor, this additional remark is to be made, that throughout this investigation, the prestation (performance) is assumed to lie in the *obligation itself*, and not in the *condition* of the obligation: for if it lay in the *condition* only, the *penalty* would of course be divisible. The result therefore, stated generally, is, that both in the case of the *Predial Servitude*, and in that of the *Opus*, and in that of the *Indivisible Forbearance*, there is a veritable correal debt, existing *ipso jure, i. e.* independently of the volonté, and this indeed is the second ground of the correal obligation, just as the act of *volonté* was the first.

§ 35.

Continuing this investigation of Decided Cases, and taking now

B. The cases in which the plurality of persons (whether such plurality has existed from the first or has arisen subsequently) is on the side of the *creditors* who of course may sustain some prejudice by the division or indivision:

Here, 1. In the obligation of the *Predial* Servitude, each co-haeres of one original creditor, also each of two original co-creditors, may sue *in solidum*, but the common debtor, also each co-debtor, is only condemned in part. Moreover, when one co-creditor had brought a successful action (whether that action was *confessoria* or was *personalis*) the other co-creditor or co-creditors enjoyed the advantage of it, the danger of bringing the whole matter into suit at once being avoided by the customary *praescriptio* inserted in the usual manner at the commencement of the *Intentio*.

2. In the obligation of the *Opus*,—the rule is absolutely the same as in the Predial

Servitude; but no mention of this case is to be found in the Sources.

lastly, 3. In the obligation of the *Indivisible Forbearance*,—the co-creditor alone who is disquieted can sue.

§ 36.

Indivisible obligations in Modern Law:

The true basis of the indivisible obligation lying in *natural* considerations, the theory above set forth must hold in modern quite as much as in ancient law. Thus, although the stipulation has ceased to exist in modern times, yet indivisible obligations may *now* exist, because they could also formerly exist, independently of the *stipulatio*, *e. g.* in the contract of *sale*, in which a right of way might be reserved; also, *e. g.* in the contract of *hiring*, in which the question of an *opus* might be part of the agreement. Moreover, the attempt to derive an argument against the existence of the *indivisible* obligation in modern times from a supposed *equitable* distinction between conventional stipulations on the one hand as being more strict, and praetorian stipulations on the other hand as being more discretionary, is as unsuccessful as the supposed distinction is untrue. On the contrary, the grand distinction in modern times is this, that whereas in ancient times specific performance was effected through the medium of some pecuniary consideration annexed by way of penalty to the non-performance, in modern times, the judgment awards specific performance directly, and without having recourse to any such medium. Consequently, 1. In the case of several debtors, or persons liable, one is liable as agent for the others to effect the performance, and, he failing, the judge himself effects it, in the case as well of the creation of a *Predial Servitude* as in that of the construction of an *Opus*.

and, 2. In the case of several creditors or persons entitled, the rule is the same as in the case of several *debtors*, or persons liable.

Even in the case of a *forbearance* (*abstention*) that is *indivisible*, the rule is the same; but in this latter case the injured party alone may sue, just, indeed, as in Roman law.

§ 37.

d. Possible as opposed to *Impossible Prestations:*

The end of an obligation is to render necessary and certain acts which otherwise would not be so. This end, the characteristic end of the obligation, cannot be produced at all in the case of the Impossible Prestation. The *Sources* of the impossibility of a prestation are twofold, being either

1. Natural,—as where the thing does not and cannot exist,

or, 2. Legal,—as where the prestation is *contra bonos mores*, but hereunder distinguish between, on the one hand,

1. An *Objective* Impossibility, which Venuleius calls the *Impedimentum Naturale*, and on the other hand—
2. A *Subjective* Impossibility, which the same jurist calls a want of the *facultas dandi*.

This latter species of impossibility, being of course *personal* to the party, is no excuse for non-performance, any more than a debtor without *means* to pay his debt is discharged of the debt. Two examples of the latter species of impossibility are,—

1. The Promise to give a *slave*, whom the owner refuses to sell;

and, 2. The Promise to give at Rome a slave who is at Ephesus:

§ 38.

e. Determinate as opposed to *Indeterminate* Prestations:

If the prestation is absolutely indeterminate the obligation is *null*, and even if it be absolutely indeterminate in quantity alone, the obligation is also *null*,—see Dig. 45. 1. 115. pref. "Triticum dare oportere stipulatus est aliquis . . . . si cum

destinare genus et modum *vellet et non fecit,* nihil stipulatus videtur; igitur ne unum quidem modium." If the degree of indeterminateness amounts, however, merely to giving the debtor an *option,* the obligation is good.

Now, such an option may arise in one or other of the following four ways, namely,—

either, 1. Because the obligation is *alternative,*

or, 2. Because the obligation is *generic,*

or, 3. Because the obligation is *quantitative,*

or, 4. Because the obligation is a *money-debt:*

To consider, firstly, that species of indeterminateness, which is due to, 1. the *alternative* nature of the obligation:

The word *alternative* does not occur in the sources; the phrase *disjunctiva* obligatio would express it more classically. The option which exists in this class of obligation belongs according to the difference of circumstances to different parties,—thus,

a. In the case of a *contract,*—the option belongs to the debtor, as stated in Dig. 45. 1. 138 § 1,—"cum purè stipulatus sum, illud aut illud dari, *licebit tibi,* quotiens voles, *mutare voluntatem in eo quod praestaturus sis.*" Now that this should be so is entirely logical, because the obligation is equal to the *activité* of the debtor. The debtor in the alternative obligatio may even reclaim the part which he has paid in the mode in which he has paid it, and may pay in the other or alternative mode ("*quamdiu id quod promissum est solvatur,*" Dig. 45. 1. 75. § 8.), but he loses his option after he has made a *constitutum.* The creditor who gives up one alternative, whether he does so by means of an *acceptilatio* or by means of a *pactum de non petendo,* loses the other alternative also, unless indeed he should (as he may) expressly reserve the other alternative. He may even stipulate for the option to himself.

again, *b.* In the case of a *Will,*—Here, in the case of the legacy *per vindicationem,* the option belonged to the legatee; while in the case of the legacy

per damnationem, it belonged to the executor (Haeres), see Ulp. 24. § 14,—"Optione autem legati per vindicationem datâ, legatarii electio est, veluti: *Hominem optato, eligito.* Idemque est etsi tacitè legaverim optionem. At si ita: *Haeres meus damnas esto hominem dare*, haeredis electio est, quem velit dare." However, after Justinian reduced all the four classes of legacies to one species, the option belonged in all cases to the legatee,—see Justn. II. 20. 22,—"Si generaliter servus vel alia res legetur, electio legatarii est, nisi aliud testator dixerit."

again, *c.* In the case of the mere *operation of law*,—

Here, 1. In the case of the *commodatarius*, and of the *conductor* and of the *possessor*, if either of these parties loses the res which is in his custody or possession, whether he lose it by *dolus* or by *culpa*, if he pay in lieu of the thing itself its equivalent in value, then upon the true or absolute owner afterwards recovering the thing itself which had been lost, the person who has paid the equivalent for it has the option to get either the thing itself or the money-equivalent restored to him.

again, 2. In the case of a *purchase* made for less than one half the true value of the thing sold, the purchaser has the option (and is under the necessity) either of giving up the thing or of making up the price by one-half the true value more.

again, 3. In the case of the unauthorised burial of a corpse in private ground, the person burying has the option (and is under the necessity) either of removing the corpse or else of paying for the ground.

And generally with reference to every option of this sort, where it exists at all, it passes to the *heirs* and *assigns* of the party: the phrase *Haec electio personalis est* which

appears at first sight to be to the contrary effect, is not really, when properly understood, opposed to this view. Generally also Justinian made such an option, in the case of wills at least, descendible to the heirs and assigns of the party (Justn. II. 20. 23.)

Where either of the alternatives is either impossible from the first or becomes impossible afterwards, the obligation becomes simple, if only one other alternative remains.

Lastly, the debtor who has an option, if he discharge the obligation in one mode under a mistake, has a right (according to some but not also according to others) to recall his prestation and to substitute another mode of prestation for it. And so also the debtor who has an option, if he discharge an alternative obligation in both or all its modes by mistake, has the like right (according to some, although not also according to others) of recovering either or any of the supererogatory prestations. Justinian also resolved the doubt in each of these two instances in favour of the debtor (Code IV. 5. 10.)

Under the old law, if a creditor claimed an amount which was in excess of his debt, he lost his action; but this effect was taken from the *Plus Petitio* by the combined legislation of Zeno and of Justinian, who moderated the penalty for the offence, see Justn. IV. 6. 33e., IV. 13. 10.

§ 39.

To consider next that species of indeterminateness which is due to, 2. the *Generic* Nature of the Obligation:

By *genus* is here meant an individual thing which is determinate as to its GENUS only. In the case of all obligations of this sort, whether arising under a will or in virtue of a contract, the option belongs to the debtor.

To consider next that species of indeterminateness which is due to, 3. the *Quantitative* Nature of the Obligation:

Here, the prestation consists in things which are determinate in number, in measure, or in weight only. Also, the *debtor* is the person who has the option in this case. The nature of the particular transaction may, however, limit

the debtor to pay in some particular quality (as, *e. g.* in the case of a *loan*); but otherwise he is legally free to pay in the *worst* quality, if he chooses, and herein consists the principal value of the *quantitative* obligation.

The *quantitative* obligation applies as well to *acts* as to *things*: unless where the *act* is of a specifically determinate nature, as *e. g.* if it is the creation of a work of art, in which latter case considerations of quantity are of course inapplicable.

§ 40.

To consider next that species of indeterminateness which is due to, 4. The circumstance of the obligation being *Money Debts*:

The question which here arises concerning money debts is this,—When a loan of money is made, and the value of money afterwards alters, in what way is the debt to be discharged? This question involves a consideration of the two following questions,—

1. What is the true importance of a money debt? and even, 2. What is the true nature (idée) of money.

Now to consider the 2nd of these two questions first, namely,—*The true nature of money.*

This consists in the idea of wealth (richesse) regarded as a power or domination over some fraction of the material universe. This abstract idea is realised in money as the measure of values.

But while money is thus, 1. A simple instrument of measure, it is also, 2. A valuable thing in itself, and may, therefore compare with other modes or varieties of value. This intrinsic value of money results from the universal or general agreement of men assisted or regulated by the state. But this state-assistance, or state-regulation is not arbitrary but is limited in extent, and that for the two following reasons,—

1. The trade in money extends beyond the limits of the individual state which regulates it;

and, 2. Even within the limits of that state itself, the state may not exceed the general trust of its own subjects.

The state is therefore simply a regulator (intermédiaire) of the general opinion of mankind, and in particular of its own subjects.

The *substance* of money has varied, according as gems, shells, or other like things, or metals have been used as the measure of value. *Metals* have been most used, and in particular, *Bronze* (Aes) by the Romans, and *Gold* or *Silver* by the moderns generally,—these latter two substances having many qualities of divisibility, malleability, &c., to recommend them.

The *amount* of the value of each piece of money is commonly marked upon it, the regulation of the state being principally useful for this purpose within the limits beforementioned of general confidence, the subjects reposing their faith in the *mark* and the *amount* agreeing.

The circumstance that the two modern standard metals (gold and silver) are both in current use, has occasioned some difficulty; and this difficulty has further occasioned the necessity of making one of these metals the principal and the other of them the subordinate standard metal. In England, gold is the principal and even the exclusive standard metal; while in Germany gold, (*e. g.* the *ducat* in Austria, and the *pistole* in Prussia) is one standard, and silver (*e. g.* the *florin* in Austria, and the *thaler* in Prussia) is another: moreover, there is an understood rate of exchange (agio) between them.

Paper-money has no intrinsic value such as other kinds of money have. In paper-money, the state takes the initiative, and the subject accepts the currency, because he reposes a limited measure of confidence in the government, and because in the general case, paper-money is convertible at any moment into coinage or metal-money.

Paper-money has two advantages,—1. It is portable or light; and, 2. The state which issues it obtains by means of it a loan of money without paying interest upon the loan.

Paper-money has also two characteristics,—1. It is a real money; and, 2. It is a debt bearing no interest.

Copper-money, (called also *odd*-money, monnaie d'appoint) is, comparatively speaking, a Paper-Money, the cost

of the mintage of it overbalancing so much the intrinsic value of the metal. It is intended to be used on petty occasions only.

Mixed copper and silver money (called also *Base*-Money, Billon) is also, comparatively speaking, a Paper-money, and for the like reason that copper money is so, the admixture of copper predominating in it, and the proportion of silver being small. This species of money is also intended to be used, like *odd*-money, on petty occasions only.

The title of moneys (le titre des monnaies) is the phrase that is used to signify the weight of the standard (precious) metal which each coin contains. In Germany, the title of moneys is the silver mark of Cologne, which is coined into twenty-one florins or 14 thalers, according to which proportion, four thalers equal six florins. This has been so since 1750. In South Germany, however, by the law of the Zollverein of 1838, four Prussian thalers equal seven florins.

§ 41.

There are three values in Moneys:

A. The Nominal Value,

B. The Metallic Value,

and, C. The Current Value.

A. The *Nominal* Value.

This value depends upon the *will* of its author (The State), signified in whatever manner; it applies as well to Paper-money as to other moneys, but it does not apply, strictly speaking to *Foreign Money*, except indirectly through the medium of a tariff. It is sometimes called the *external* value, a worthless designation; sometimes also it is called the *legal* value,—an improper designation:

B. The *Metallic* Value.

This value depends on the weight of the standard metal (gold or silver), which is included in a coin,—a weight which is determined by actual weighing, and chemical analysis combined, two

processes which the subject escapes making for himself by trusting to the mark of the State:

This value does not apply to Paper Money, and hardly at all to Copper Money:

This value is accepted beyond the limits of the particular state which coins it. Certain circumstances might induce the subject to distrust the *Impress* of the *State*, not indeed, the circumstance of each coin containing a small amount of alloy in addition to its just amount of the standard metal, although thereby the value of the coin is made to exceed the impress even;

but, 1. The circumstance of each coin containing less than the just amount of the standard metal;

or, 2. The circumstance that the cost of the mintage of the coin, must be provided for from some source or other;

or, 3. The circumstance of the unequal division of the amounts of metal amidst coins of equal value, although indeed here the principle of the *remedium* or *tolérance* operates as a check;

or, 4. The circumstance of the clipping of the coin;

or, 5. The circumstance of the natural decay of the coin by frequent use;

or, 6. The circumstance of melting the heavier, and issuing only the lighter coins.

C. The *Current* Value.

This value is that which general confidence or public agreement and opinion attribute to a certain piece of money;

It is, therefore, intimately connected with the metallic value of the coin.

It is not confined to the limits of the territory; it varies according to places and states; and even within the limits of one and the same state, it frequently varies in a great degree.

Owing to this variable nature of the *Current Value*, it is necessary in order to compare the

current values of money at different epochs, to convert it into its metallic value at either epoch, and then to compare these latter values with each other,—these latter values furnishing a measure of comparison which is practically *invariable:*

The public opinion which fixes the *current* value of money, is less liable to fluctuation than such opinion generally is in other matters;

The Relation between the three values, Nominal, Metallic, and Current,—

1. Their normal relation is one of *agreement* with each other;
2. Their irregular relations are,—

either, 1. Where the current value exceeds the metallic value,—a thing which often happens for a prolonged period:

or, 2. Where the current value is below the metallic value,—a thing which rarely if ever happens and only for a brief period. There have, however, been examples of both; for instance, in the first French Revolution, the *Assignats* and *Mandats,* both of which were *Paper-money,* soon fell to no appreciable metallic value.

And, again, in Austria, in the year 1811 and since, Bank Notes which of course are *Paper-money,* have fallen to one-fiftieth of their original nominal value.

§ 42.

To consider, secondly, the first of the two questions given above, namely:—

The true import of a money-debt:

1. Money is a *quantity,*
2. Money is a *consumable article,*
3. Money is not a *generic-substance* (genus) although one piece of money is scarcely distinguishable from another.

therefore, 4. *Money-prestations* are different from *generic*

prestations, the parties to the obligation contemplating in the case of the money debt a determinate value.

The question to determine is this,—which of the three values mentioned above is the *value* which is contemplated? The question would be of no practical importance if all values were in the normal relation mentioned above: but it becomes of much practical import where a change has supervened in that *relation* between the time of the loan being made and the time of the loan being discharged.

To consider the question with reference to each mode of value in succession:—

1. The *nominal* value is not the value contemplated.

This is so,—

Because, 1. The State merely regulates the value of money,

and because, 2. Even when the State enacts a *law* determining this value, there,—*a*. If the law does not *compel* the acceptance of the value so determined, that value is not the value contemplated; although, *b*. If the law does compel the acceptance of it, *i. e.* establishes a *forced currency* then of course this value is the value contemplated:

The following reasons may be given for not accepting the *nominal value* as the contemplated value (in at least the absence of a forced currency),

namely, 1. The nominal value is not extendible beyond the State itself which issues it;

2. The Power of the State, even within the State, is limited: in fact, if the State alters the nominal value, the alteration is practically confined to debts already existing at the date of the alteration;

moreover, 3. The effect of the alteration is unjust, as well towards foreigners as towards subjects;

and lastly, 4. Its moral effect also is bad.

2. The *metallic* value is not the value contemplated; and that is proved as well by the following considerations as by others,—
    1. The circumstance of the existence of Paper-money side by side with metallic money in practice, coupled with the further circumstance that different rules must apply to each of the two values;

    and, 2. The metallic value is only applicable to *loans.*
3. The *current* value is the value contemplated, and that for the following reasons,—
    1. General opinion both makes a thing money and also fixes the measure of its value;
    2. Now this is precisely the nature of the *current* value;

therefore, 3. The current value is the universal money.

Examples of the application of the *current value* towards the discharge of a debt,—

(1.) 100 Austrian florins lent, would be repayable at one period by 100 bank notes, and at another period by 400 bank notes;

(2.) 400 Prussian thalers lent, would be repayable at one period by 9,600 groschen, and at another period by 16,800 groschen:

And generally, repayment is to be made in as much standard (gold or silver) metal as the lenders could at the time of making the loan have purchased with the money lent; and it will not do to return even the identical pieces of money lent,—supposing always that a repayment in this latter way was not expressly stipulated: subject, however, to any further modification arising from some (if any) alteration in the title (titre) of moneys, and subject also to any reduction in the effect of such alteration requiring to be made and made for the purpose of compensating any anterior deterioration.

Mode of ascertaining the *intention* of the parties to money-debts,—

1. Assume the *current value* to have been intended, until some special agreement to the contrary is shown;
2. This *current value* is to take for its basis the standard (gold or silver) metal, and not something in *kind*: as well,—

because, 1. Lenders and borrowers think only of metal,

as also because, 2. Loans are in general made for so short a period, that a change in the rates of value is not within the intention of the parties to the loan.

In the case of loans for lengthened periods, as also in the case of old rentes (Stocks),— { some measure of loss is almost inevitable in the repayment of the first, and is absolutely so in the repayment of the second.

§ 43.

Money regarded in other aspects than that of money simply,—

1. Regarded as a part of property,—
   e. g. in *commodatum*,
   in *vindicatio*,
   and in *usucapio*;
   and more especially where money is *earmarked* in any way:
2. Regarded as merchandise,—*e. g.* in collections of old coins, &c.

Exceptional Money-Contracts.

1. Speculative agreements to replace loans of stock with the same amount of stock irrespective of the *current values*;
2. A loan of 100 florins of paper-money to be repaid in 100 florins of metallic money, this being in fact a debt bearing usurious interest;

3. A judgment to pay 100 thalers in pieces of one thaler, this being in fact an order to pay 100 separate thalers;
4. Where two species of money bear the same name, —that one of the two species which is the more usual is to be taken to have been the one intended: if neither of the two is more usual than the other, then the obligation is a generic one;
5. Where "1,000 thalers in gold" is the bargain, this equals "200 pistoles" without regard to the *current value;*
6. Where the piece of money specified has gone out of use, then it becomes necessary to resort to the *current* value, and if the latter value is undiscoverable, then it is necessary to resort to the *metallic* value merely.

§ 44.

The Roman law relating to the repayment of a loan or common money debt:

The texts are both scanty and indefinite; such as they are, they are the following:

1. Dig. 46. 3. 99. (Paul),—"*Creditorem* non esse cogendum in *aliam formam* nummos accipere, si ex eâ re damnum aliquid passurus sit."

   Here *alia forma* is too vague to allow any certain inference to be derived from it.

2. Dig. 18. 1. 1. (Paul),—"Electa materia est, cujus *publica* ac *perpetua aestimatio* difficultatibus permutationum *aequalitate quantitatis* subveniret."

   This text is entirely neutral as to the three values mentioned above.

3. Code 11. 10. 1,—"Solidos veterum principum veneratione formatos ita tradi ac suscipi ab ementibus et distrahentibus jubemus, ut nihil omnino refragationis oriatur modo ut debiti ponderis sint et speciei probae: scituris universis, qui aliter fecerint, haud leviter in se vindicandum."

Here a *forced currency* is given, but for a particular purpose only, and the metallic value is in the same breath recognised.

4. Code 11. 10. 2,—"Pro imminutione, quae aestimatione solidi fortè tractatur, omnium quoque pretia *specierum* decrescere oportet."

Here *species* does not mean something other than money, *e. g.*, corn, but means the various kinds of money itself. Cf. Dig. 28. 5. 78 § 1. "Nummis Titio legatis, *nummorum specie* non demonstratâ."

And the passage therefore amounts merely to a direction to the employés of the mint.

5. Canon Law, 3. 39. 20 X,—THREE *denarii papienses* equalled NINE *denarii lucenses*,

Afterwards, upon the denarius lucensis falling to three sixth parts of its former value, equalled EIGHTEEN denarii lucenses.

§ 45.

Authors who have accepted the Three Values respectively:

A. *Nominal Value,—Voet, Pothier*, &c.

B. *Metallic Value,—Puchta*, &c.

These latter err in omitting to take into account paper-money.

C. CURRENT VALUE,—*Koch, Hufeland*, &c.

This also is the value for which Savigny decides. Unterholzner's opinion is too obscurely expressed to say which opinion it is.

§ 46.

1. In Prussia, prior to 1794 (the epoch of the foundation of the *Landrecht*), the current money was a silver coinage, the *title* being fourteen thalers; there was also the gold coin called *Friederichsdor*, equal to fifteen thalers, together with *odd* money and *base*-money; paper-money was unknown. The only blemish was the abundance of *odd* money, and yet no evil arose in practice from this defect. Since 1794, the matter is regulated by the *Landrecht*, and the decisions

thereon. Suppose, therefore, a change in the money system to have taken place between the creation and the discharge of a loan, here,—

1. The current value is to be taken into account exceptionally, that is to say, when the transaction relates to foreign money, or where the particular money has gone out of use;
2. The metallic value is to be taken into account only in the case of a general modification of the title of money;
3. The nominal value. With reference to this value, the landrecht contains a much disputed text (L. R. I. 11. § 790), which is to this effect:— when the species of money, although remaining in use, yet has experienced by order of the State a reduction in its *valeur externe* without also experiencing any reduction in its *valeur intrinseque*, repayment ought necessarily to be made and accepted in the same species of money, and *also with the same number of coins.*

The most recent plan of a code adopts the view which is stated in the extract,—see Projet ii. 8. § 595.

This principle was attempted to be applied notably after the disasters of 1806; but the iniquity of repaying twenty four groschen of undepreciated value with twenty-four groschen of value one-third depreciated, was too manifest to succeed, and the repayment was eventually made by thirty-six groschen ($24 \cdot /. \frac{2}{3} = 36$).

In 1811, groschen were reduced to four-sevenths their original or nominal value, and obtained a fixed currency; but the evils of this reduction were avoided, unless in cases of imprudence in accepting large numbers of them previously. Moreover, *Paper-credits*, which, whether *Debentures* (Bons Hypothecaires) or *Shares* in Industrial Companies, are not money, not being securities of value, and which accordingly are treated by the Landrecht as pure quantities, are repayable in kind, and with the same number of themselves.

Paper-money was introduced into Prussia in 1806, and

had at that time a forced currency. The forced currency was, however, removed in 1813, and now the judge is left entirely free in respect of money-debts contracted in this species of currency.

§ 47.

(2.) In French law, the *Nominal Value* is generally admitted. This is clear from (among other passages) Code Civil Art. 1895, " S'il y a eu augmentation ou diminution d'espèces avant l'époque du paiement, le debiteur doit rendre la somme numérique prêtée, et ne doit rendre que cette somme dans les espèces ayant cours au moment du paiement." Moreover, the Authors, interpreting this part of the code, namely, Maleville, Toulier, and Merlin, leave the matter beyond all doubt by their particular instances. But this opinion is in complete contradiction to correct opinions regarding the nature of money, and Pothier, from whose works it is chiefly taken, died in 1772, long before the troubles of 1795 and of the following years; and although, therefore, Pothier accepts (it is true) " le valeur que le prince y a attachée " (see " Traité du prêt de consomption," Pt. i. ch. 3. Nos. 36, 37), yet had he lived to witness the events which followed his decease, and had the ideas regarding money which these events first suggested been present to his mind, it is more than doubtful whether he would have given his opinion for the nominal value.

§ 48.

3. In Austria, at the time of the codification of the Austrian law, which was in 1811, the State was in the opposite condition to that of Prussia in 1794, being greatly distressed in its commercial relations by reason of the excessive lowering of its paper-money. The Austrian code merely reproduces the then existing law relative to paper-money. The following are cases in illustration of the Austrian law of money-debts,—

1. When the metallic value undergoes a change in its nominal value, here no alteration is made either

in the mode or in the amount of the repayment (cf. Prussian Law, § 790 supra).

but, 2. When the species of money is gone out of use,—the debtor is to repay in other species, so as that the creditor may obtain as much intrinsic value (valeur metallique) as he originally gave.

§ 49.

In further consideration of the object or content of the obligation, and now that, 1. The *nature* of the Prestation has been considered, there remain to be considered, 2. *The Place*, and, 3. *The Time* of the Prestation.

Considering, therefore, 2. *The Place* of the Prestation.

Here, the question relative to the creditor is, where he may enforce; and relatively to the debtor, it is, where he may offer,—payment.

Now, 1. Some prestations are inherently *local*, and, therefore, in these, the *place* of the Prestation is that of the situation of the thing:

but, 2. Other prestations are entirely *transitory*, and with reference, therefore, to this 2nd class of prestations,—

If, 1. The contract itself fixes the place of prestation,—then, in that case, the *creditor* must sue in that place, and may not remove the venue of his action to the *domicile* of the debtor; although, indeed, he may partially do so by means of the *actio de eo quod certo loco*, Dig. 13. 4. 1. 4: or generally if the action is one *juris gentium*:

The *Debtor*, when sued in the action *de eo quod certo loco*, might defend the same either by giving security to pay at the place fixed, or by proving that he had either already deposited or already offered the amount at that place.

but if, 2. The contract fixes no place of payment,—then, in that case, the *Creditor* may sue in any place in which the debtor is amenable

to the jurisdiction, by consent or otherwise; but the creditor must accept the *traditio* of the thing in the locality of the thing at the time the prestation falls due.

The *Debtor*, on his side, has a limited selection with regard to the place of payment, being able to select any or either of the places in which he is liable to be sued by the creditor.

§ 50.

Lastly, considering, 3. The *Time* of the Prestation:

The fixing of a definite time of payment, although *possible*, is *unusual*.

In the assumed absence, therefore, of any fixed time, the general rule is,—That the time of payment arises immediately upon the obligation itself taking effect as such; whence, the obligatio in such case is called a *praesens obligatio*. The exceptions to this general rule are the following principally, namely,—

1. If the *obligatio* is *in diem*, then it is exclusively in the interest of the debtor, who may accordingly accelerate the postponement of the time.
2. If the *obligatio* is from its nature NECESSARILY *deferred* in its performance, whether because of distance or because of the non-existence as yet of the object, the time is dependent upon some demand, summons, or such like event.

and, 3. If the *obligatio* is a *constitutum*, TEN days is the usual period of GRACE.

Upon default in payment at the proper time, the debtor becomes *in mora*, the full treatment of which subject must here be deferred until we come to the consideration of the *sources* of the obligation.

CHAPTER II.

THE *SOURCES* OF OBLIGATIONS.

§ 51.

These sources are two in number, being
either, 1. Primary or Original,
or, 2. Secondary or Transformed.

1. The Primary or Original Sources are variously designated and variously classified, as follows:
a. As being either, 1. Ex contractu,
or, 2. Ex delicto;
or, *b.* As being either, 1. Ex contractu and quasi so,
or, 2. Ex delicto and quasi so;
or, *c.* As being either, 1. Ex contractu,
or, 2. Ex maleficio,
or, 3. Proprio quodam jure ex variis causarum figuris.

It is, however, to be noted that all these various designations amount essentially to the same thing; Gaius, *e. g.*, uses them all interchangeably.

The contracts (or delicts) which are here mentioned are conventions (and violations of right) provided with actions by the strict *jus civile*.

There are two methods of inquiry available in this study,
either, 1. That which leads from the abstract idea of the convention (or of the violation of right) downwards to concrete instances of such convention (or violation);
or, 2. That which leads off from these concrete instances as its starting point,—this latter being the method adopted by Justinian and Gaius.

2. The Secondary or Transformed Sources arise in a various manner from one or other of the following two circumstances, namely,—

either, 1. A change of the Persons concerned in the obligation;

or, 2. A change in the *Object* or *Content* of the Obligation.

Considering all these varieties of source in succession, and for this purpose considering

A. *Contracts,* as opposed to *Delicts,* and as opposed also to the *Variæ Causarum Figuræ* of the preceding classifications,—

Contracts must be considered under the following four divisions, namely

I. The *Nature* and the *Varieties* of the Contract,

II. The *Persons* concerned in the Contract,

III. The *Conclusion* (including the *Interpretation*) of the Contract,

and, IV. The *Effects* (including the *Object* and *Content*) of the Contract.

§ 52.

I. The *Nature* and *Varieties* of the Contract, and hereunder, 1. The *Nature* of the Contract:

A convention, in its most general aspect, is the agreement of several persons who by a common act of the *will* determine their legal relations, and that either, *a.* For the purpose of creating an obligation, or, *b.* For the purpose of extinguishing one. But a convention, in a narrower sense of the word, being that sense of it in which it results in the creation of an obligation, is the agreement of several persons in one and the same act of will, resulting in an obligation between them.

Conventions are variously designated

either as, 1. Conventio,

or as, 2. Pactio,

or as, 3. Pactum.

I. The *Nature* and *Varieties* of the Contract (continued), and hereunder, 2. The *Varieties* of the Contract:

The varieties of conventions are determined upon one or other of the six following principles into one or other of the six following classes, namely,—

The First Variety of Conventions rests

A. Upon the principle of the *Historical Origin* of Conventions, according to which they form two classes, namely,

either, 1. *Legitimae* conventiones,—being those conventions which find their SOURCE in the *jus civile;*

or, 2. *Juris Gentium* Conventiones,—being those conventions which find their SOURCE in the *jus gentium.*

The meaning attributed to *Legitima* in this first class is the correct meaning of that term, notwithstanding that Paul in Dig. 2. 14. 6, uses the phrase *Legitima Conventio* so as to include generally a "conventio quae lege aliquâ [vel senatus consulto] confirmatur," and so as in the particular passage to denote those *Pacta Adjecta* which by the law of the xii. Tab. were made actionable when annexed to the *mancipatio*, "*Quum nexum faciet mancipiumve*, uti linguâ nuncupassit, ita jus esto." This extended use of the word, although common, is objectionable.

The Second Variety of Conventions rests

B. Upon the principle of the *Internal Extent* of Conventions, according to which they form three classes, namely,

either, 1. Unilateral,—where the one party is creditor, and the other is debtor;

or, 2. Bilateral,—where each party is at once both creditor and debtor;

or, 3. Intermediate between Unilateral and Bilateral,—being those cases of contracts in which there is at once an Actio *Directa*, and also an Actio *Contraria.*

The Third Variety of Conventions rests

C. Upon the principle of the *External Purpose or End* of conventions according to which they form two classes, namely,

either, 1. *Lucrativa*,—where the advantage of the one party alone is provided for, and where the contract is therefore also necessarily *Unilateral;*

or, 2. *Onerosa,*—where the mutual advantage of both parties is provided for, but where notwithstanding the contract may be either unilateral, as in the case of a loan of money at interest, or bilateral as in the case of a sale or letting.

The Fourth Variety of Conventions rests

D. Upon the principle of the *Nature* of Conventions, according to which they form two classes, namely,—

either, 1. *Stricti Juris,*—where the contract admits of a civil law action;

or, 2. *Bonae Fidei,*—where the contract admits of a praetorian action only:

This fourth division is not to be confounded by reason of the mere similarity of the name with the first division given above; the contract of *Mutuum, e. g.* is both *Stricti Juris* in respect of its *action,* and *Juris gentium* in respect of its *historical origin.*

The Fifth Variety of Conventions rests

E. Upon the principle of the *Formalities* accompanying conventions, according to which they form two classes, namely,

either, 1. *Solemn,*—where the formality is an essential accompaniment;

or, 2. *Non-Solemn,*—where there is either no formality at all, or the formality (if any) is non-essential.

The Sixth and Last Variety of Conventions rests

F. Upon the principle of the *Efficacy* of Conventions, according to which they form two classes, namely,

either, 1. *Contractus,*—where they yield an *action;*

or, 2. *Pacta,*—where they yield an *exception* merely.

§ 53.

II. The *Persons* concerned in the contract.

Persons figure variously in contracts; the varieties of their configurations are the following,—

1. The *Simplest Form* is that in which

either, *a*. The *ostensible* parties are also the *real* parties to the contract;

or, *b*. The parties to the contract are *determinate* and *individual*.

2. The *Complex Form* is that in which

either, *a*. Some *third person* (other than the *ostensible* party) is the *real* party to the contract;

or, *b*. The parties to the contract are *individually indeterminate*.

We shall consider the two sub-varieties of this Complex Form in their order.

a. The first sub-variety, namely, that sub-variety in which some 3rd person is the real party to the obligation, presents itself in still two further sub-varieties, according as such 3rd person is a party to the contract,—

either, 1. *With representation*,

or, 2. *Without representation*.

§ 54.

To consider, FIRST, the case in which such 3rd person is a party,—

1. *With representation*, and hereunder to consider generally,—*The Question of Representation in Roman Law*.

This question must be considered in two ways,—

a a. By an examination of Particular Cases of it,

and, *b b*. By an enquiry into the General Principles of it.

a a. The *Particular Cases* of Representation;

1. Under the *old law*.

α. *Children in potestas* and *slaves* acquired CREDITS for their owner or father and that independently of their own wills, and independently also of the will of their owner or father.

β. *Children in potestas* and *slaves* did not acquire DEBITS,—for their owner or father, and that independently of the will of their owner or father.

γ. *Extraneae personae* acquired neither CREDITS NOR DEBITS for a 3rd person.

2. Under the *more recent law*,—

Two varieties of representation sprung up, namely,—

a. Representation by means of new Praetorian actions, and, *b*. Representation by means of the discretionary grant or refusal of existing actions:

To the former of these two varieties, namely,—Representation by means of new Praetorian actions, belonged the following actions,—

1. The *Actio exercitoria*,—which was applicable whether the manager (magister) was in the potestas of the owner (exercitor) or not, with this consequential distinction, however, that *recours* was permitted in the latter case, and not in the former. And with reference to this action, it is to be further noted that it lay primarily between the ostensible parties, and only by *cession* (*forcée* ou *feinte*) between either of them and the 3rd person: see Dig. 14. 1. 5. § 1: "Hoc edicto non transfertur actio, sed adjicitur," (wherefore also these actions were called "Actiones *adjectitiae* qualitatis.")
2. The *Actio institoria*,—being the actio exercitoria generalised: and yet the actio institoria was more restricted than the exercitoria actio, *delegation* being admitted in the former, but excluded in the latter variety of action. Moreover, in the actio institoria the action is indifferently even in the 1st instance between the ostensible parties, or by and against the *real* parties to the contract.
3. The *Actio de peculio*;—Here the child or slave in potestas, is an *institor* with "*limited liability*": This action allows also the father's *deductio*:
4. The Actio *tributoria*,—This was like the actio *de peculio*, only excluding the father's *deductio*.
5. The *Actio quod jussu*,—This was early necessitated by the maxim of the old law, that a father could not acquire DEBITS through his child in potestas, even though the father consented to the obligation: The *Jussum* may either precede or follow the

contract; it may be either written or oral, it must be certain, but it need not be imperative.

Furthermore, the *Jussum* was confined to *single* transactions.

and, 6. The *Actio de in rem verso*,—Here also a father acquires DEBITS through his children, or through his slave in potestas, not, however, as in the actio *quod jussu*, from his *will* to do so, but merely from the circumstance of his *enrichment*.

The actio *de peculio* and that *de in rem verso* may unite into one action, namely, the actio *de peculio deque eo quod in rem domini versum est:*

See Justin. iv. 7. 4,—"Licet enim *una* est actio .... tamen duas habet condemnationes."

It is necessary to distinguish the *actio de in rem verso* from the *actio mandati* and from the *actio negotiorum gestorum*, these two latter excluding the necessity of the former in the case of free persons.

With respect generally to these *Actiones Adjectitiae Qualitatis*, and the distinction between the old law and the law of Justinian's time,

1. In Justinian's time,—the creditor had two debtors,

but, 2. In the old law,—the creditor had one *debtor* (quem *dare oporteret*), namely, the manager (magister) and one *defendant* (quem *condemnari oporteret*), namely, the master (exercitor).

In the case, however, of the *Mutuum*, when entered into with a child in potestas, a *direct* action also (condictio) lay against the father, and not as in the other cases an *actio adjectitiae qualitatis* merely. This circumstance explains the apparent ambiguity of certain texts which seem to speak of the existence of the *direct* action, side by side with the *indirect* action in the case of all these contracts indiscriminately; but in truth, these ambiguous texts relate to the *Mutuum* exclusively.

§ 55.

To the latter of the two varieties of Representation mentioned above, namely, Representation by means of the dis-

cretionary grant or refusal by the Praetor of existing actions, belonged the following actions,—

1. In the case of the *Tutor*,—the actions were given to and against the *pupillus* himself so as to save the tutor harmless. This action was necessary, because the tutor was not competent to be the *agent* of his pupillus.
2. In the case of the *Official Administrator of a Town*,—the actions were given to and against the town itself, so as to save the administrator harmless.
3. In the case of the *Attorney in an Action or Suit*,—

Here, *a*. If the attorney was a *cognitor*,—the principal was directly affected;

but, *b*. If the attorney was a *procurator*,—the agent was the person directly affected, and the principal was only indirectly so; nevertheless, in this latter case, the Praetor gave the actions directly to and against the principal himself.

§ 56.

bb. The General Principles of Representation.

1. The principles of the old law excluding representation were, in general, retained in the solemn, and abandoned in the non-solemn, species of contracts. This is clear from the following passage, which is attributed to Modestinus, namely,—

Mod. XIV. ad Qu. Muc.—"Ea quae *civiliter* acquiruntur per eos qui in potestate nostrâ sunt acquirimus, veluti *stipulationem*; quod *naturaliter* acquiritur, sicuti est *possessio*, per quemlibet volentibus nobis possidere, acquirimus."

Now in this passage, it is clear that *stipulatio* is used as a type of the old law, and *possessio* as a type of the more modern law.

The passage is also with greater probability attributed to Modestinus than to Pomponius, the former jurist having lived at the close of the

period of the jurists, the latter towards the beginning of that period; and it is incredible that a passage of such point and importance in the question of Representation in Roman Law, if it had occurred in an early writer, should not be (as it has not been) repeated in the works of the subsequent jurists.

2. The Process of the admission of Representation was, however, very *gradual*, and appears, indeed, not only to have commenced with, but to have also long rested at, POSSESSIO.

but, 3. Ultimately, in the time of Justinian, the *stipulatio* was the only contract which excluded representation, and in modern times even that exception has disappeared.

lastly, 4. The Rule of the Canon Law aptly expresses the modern state of the law,—"Potest quis per alium, quod potest facere per se ipsum."

The influence of the Modern Principle of Unlimited Representation upon the *Individual instances*, mentioned above, remains to be stated. Now, both

1. The Actio exercitoria,
and, 2. The Actio institoria

} Are become superfluous, although they are yet extant in modern times. Also, both

3. The Actio De Peculio
and, 4. The Actio Tributoria

} Have been abolished in modern times; as have also the following actions, namely,

5. The Actio Quod jussu,—
and, 6. The Actio De in rem verso; moreover, the old actions which were furnished in the following cases, namely,

7. In the case of the Tutor,
8. In the case of the Administrator of a Town,
and, 9. In the case of an Attorney,—

} Are all become superfluous at the present day.

§ 57.

Some *Traces* of the relaxation of the old law, excluding Representation, may be detected in the sources.

Thus, *a*. The act of *will* is the alone consideration that is regarded in the non-solemn classes of contracts;

e. g. 1. In the *Consensual* Contracts,

2. In the *Real* Contracts,

3. In the *Constitutum*,

and, 4. In the *Pactum*:

Also, *b*. All these non-solemn classes of contracts are *bonae fidei*; they may, therefore, be transacted in the *absence* (as well as in the *presence*) of the parties, *e. g.* through a messenger (nuncius), who, strictly speaking, is not a representative at all; and herein, indeed, the *nuncius* is distinguished from the *Procurator* or REPRESENTATIVE Proper; although it is true that even the *Nuncius* may have a limited discretionary power of selection or of otherwise acting as an agent proper, and in that way he would shade off into the Procurator or *Representative proper*, while still continuing a *nuncius* merely: And thus the *Procurator* and the *Nuncius* may equally be the instruments or agents of a principal:

The true distinction in questions of representation is, therefore, not one of words merely, that is to say, not the distinction between the *Nuncius* and the Procurator; but it is rather of the following nature, that is to say,—

1. Does the agent (whether *nuncius* or *procurator*) treat *in the name of his Principal?*

or, 2. Does he treat *in his own name?*

In the former case, the actions pass to and against the principal directly and do not affect the agent at all; whereas, in the latter case, the actions pass to and against the agent directly, and only pass to and against the principal by cession (forcée ou feinte): The distinction now

taken is indicated in the following phrase,— "*Actio ad exemplum institoriae actionis.* This action was an extension and generalization of the *institoria actio.*"

The following texts also bear out the same distinction, namely,—

1. Dig. 16. 3. 1. § 11 :" Si te rogavero, ut rem meam perferas ad Titium ut is eam servet, quâ actione tecum experiri possum, apud Pomponium quaeritur. Et putat, tecum mandati; *cum eo vero qui eas res receperit, depositi.* Si vero tuo nomine receperit, tu quidem mihi mandati teneris, *ille tibi depositi; quam actionem mihi praestabis, mandati judicio conventus.*"

   Here the nuncius, so far as he is such, is a mere colourless medium, and the principal has a *direct* action.

2. Dig. 19. 1. 13. § 25 : " Si procurator vendiderit et caverit emtori, quaeritur an domino vel adversus dominum actio dari debeat. Et Papinianus libro tertio Responsorum, putat cum domino *ex emto agi posse utili actione ad exemplum institoriae actionis,* si modo rem vendendam mandavit. Ergo et per contrarium dicendum est, *utilem ex emto actionem domino competere.*"

   Here the procurator, so far as he is such, has the *direct,* and the principal has only the *utilis,* actio.

moreover, 3. The Pacti Exceptio, the Doli exceptio, and all other the equitable defences available for the agent, are available also for the Principal.

4. In the case of the *Mutuum,* the relation of creditor and debtor lies *directly* with the principal.

§ 58.

Puchta's opinion is, that Representation continued to be excluded from the Roman Law even in the time of Justinian in the non-solemn as well as in the solemn classes of contracts, and that even in the latest times the principal was only *indirectly* concerned in all cases. But Puchta is thinking only of the *Procurator* as distinguished from the *Nuncius;* and what he says is true only of the *Procurator*.

§ 59.

To consider, SECONDLY, the case in which some 3rd person (being the *real* but not the *ostensible* party to the contract) is such party,—2. *Without Representation.*

Now, it may be stated generally, and at the outset, that in the absence of representation, whether the question be one of casting any liability upon a 3rd person, or be one of procuring him some benefit, the answer must in both cases be, that no such result can be attained in Roman Law: see Code 5. 12. 26: "Nec sibi, cessante voluntate, nec tibi, prohibente jure, quaerere potuit actionem."

The motive for this restriction upon the efficacy of Obligations is the circumstance that every obligation is a restriction of the Natural Liberty as already stated in § 2. supra.

The following Texts support the general principle now stated, namely,—

1. Just. iii. 19. 18. "Alteri stipulari nemo potest."
2. Dig. 44. 7. 11: "Quaecumque gerimus, quum ex nostro contractu originem trahunt, nisi ex nostrâ personâ obligationis initium sumant, *inanem* actum nostrum efficiunt: et ideo neque stipulari, neque emere vendere contrahere, ut alter suo nomine rectè agat, possumus."

The phrase *ex nostro contractu* in the 2nd passage, indicates that the agent is treating in his own name, and not as a mere *nuncius* or minister.

The general rule, before stated, moreover, applies as well to the *non-solemn* as to the *solemn* classes of contracts, and as well to *exceptions* as to *actions:*

With reference to the question that has been raised relatively to a contract *Mihi et Titio* (for self and a third person), the rule is, that in such a contract,

a. If it is in solemn form, only the half is good (Just. 3. 19. 4):

but, *b.* If it is in the non-solemn form, then the one-oneth or whole is good (Dig. 18. 1. 64).

The following cases appear to be, but are not really, exceptions to the General Rule above stated, that in the absence of Representation, a third party acquires neither liability nor benefit, namely,—

1. Cases in which the contracting party, and not any third person acquires a right, being cases in which

either, *a.* The mere discharge of the obligation (prestation) is made to the third person,

or, *b.* The discharge, although made to the third person, is for the advantage of the contracting party, whether because

aa. The third person is the son or slave of the contracting party,

or because, *bb.* The third person is the cashier of the contracting party,

or because, *cc.* The third person is a creditor of the contracting party:

or, *c.* The discharge which is to be made to the third person is in the nature of a condition.

2. Cases in which some third person, and not the contracting party acquires a right, being cases in which—

either *a.* Son or slave acquires for his father or master,—in which case there is in reality an identity of persons:

or, β. The third person subsequently ratifies the act;

or, γ. The contract is one of stipulation for an heir-presumptive;

or, δ. It is the reservation in a dotal contract by

the contracting party of a right of restitution to some third person:

This rule, together with the exceptions to it, has passed without change into the law of Justinian's time, and there is no serious reason for refusing to recognise its continuance even to the present day, although, indeed, some modern authors, by neglecting to distinguish the Presence of Representation from the Absence of Representation, have asserted the very opposite of the rule.

§ 60.

The doctrine of Representation in Modern Times.

1. In the Prussian Law,—
   - *a.* A contract entered into by an agent within the limits of his agency, binds the principal; secus, if the contract of the agent be *ultra vires*.
   - *b.* The agent contracting as such is not personally bound, with the limited exception of the commercial manager, who is entirely like the ancient *institor*.
   - *c.* In the entire absence of agency, the third person is neither liable to a debit, nor entitled to a credit, until he has ratified the assuming agent's act.

     Such agent is bound to do nothing to prevent the principal from ratifying the act; if he does, he is liable for damages. But in the absence of any such preventive attempt on his part, he is not liable for the principal's refusal to ratify.

2. In the Austrian Law,—
and, 3. In the French Law,— } the general principles of representation, as stated above, are accepted.

§ 61.

To consider, secondly, the second sub-variety of the

Complex Form or complex configuration of the parties to an obligation which is mentioned above, namely,—

b. That sub-variety of this *Complex Form*, which arises from the parties to the contract being *individually indeterminate*:

Here an *abstract quality* attracts the right or duty to itself, whatever the person:

The more usual examples of this relation are,—

1. The Usufruct, or other real right,
2. The Liabilities *du colonat* (*i. e.* of nationality),
3. The real Servitudes and Rights of Jurisdiction in Germany:

The PARTICULAR question, when stated generally, is this,—"Is it lawful to form a convention of a private nature with an indeterminate person?"

Now, to this question the answer is and must be—no; and the four following apparent examples to the contrary are to be explained upon different principles,—

1. In the case of the advertisement of some reward to the person finding lost property,—There is no *action*, the payment resting with the honour of the party: compare gambling debts.
2. In the case of the offer of prizes to students at college, &c.,—There is no action here either, although, indeed, the payment is sure.
3. In the case of Public Auctions,—There the person is really and in fact become *determinate*, before and so soon as the obligation takes effect.

and, 4. In the case of Bills or Notes to Bearer,—the consideration of these requires to be more accurately made, but the principle is still the same.

§ 62.

Bills or notes to bearer are "instruments in virtue of which a right of action is exerciseable by whoever occupies a certain position relatively to them."

Now, it is an urgent practical necessity that has occasioned the admission of such instruments, the necessity having arisen under the following circumstances,—

Property and *Obligation* differ in this respect,—That the alienation of the *former* is a continuation of itself, freed from all the personal rights and obligations of the prior owner, whereas the alienation of the *latter* is an annihilation of itself, and is the creation of a new thing charged, however, with all the subsisting rights and obligations that are exerciseable against the prior creditor: whence the alienation of the obligation is subject in the hands of the alienee to certain *exceptions* personal to such prior creditor, as *e. g.* the plea of Set-off (*compensationis exceptio*), also, the plea of the money not having been paid (*non numeratae pecuniae exceptio*); also, the plea of purchase at a speculative undervalue (*legis Anastasianae exceptio.*)

Clearly, therefore, two difficulties attend the alienation of obligations,—being difficulties that are incident to the distinction between Obligation and Property before mentioned, namely,—

1. The exceptions which are personal to the prior creditor attach to the alienee;

and, 2. The necessity exists of proving all the intermediate cessions or alienations.

But the *materialization* of the obligation is of service in avoiding or at least in relieving these two difficulties and evils affecting the transfer; and it does so by *approximating* the *obligation to property* strictly so called, bills and notes payable to bearer being the attempt which it makes in this direction.

The questions therefore which arise regarding these Bills and Notes are these,—

1. Is this mode of contract lawful and valid?

and, 2. What is the effect of its validity or invalidity?

§ 63.

In answering these questions we shall consider—

1. The modes (if any) in which the attempt might consistently with principle have been made;

and, 2. The modes in which in point of fact the attempt was made.

now, 1. With reference to the possible modes of doing it, the following are the varieties of the possible modes, namely,—

a. The fact of the possession of the Bill or Note by the third person might have entitled him to an action upon it. This mode must, however, be rejected on principle:

b. The intention of the drawer or maker of the Bill or Note (*i. e.* of the debtor) expressing itself in one or other of the two following ways might have laid him open to an action upon it, namely,—

either, 1. If the instrument was made payable to bearer, whoever he might be,—This mode must, however, be rejected on principle:

or, 2. If the instrument was made payable to A. B., a determinate individual, or to bearer, lawful bearer and such like, —Even this mode, however, must also be rejected on principle.

secondly, 2. With reference to the actual modes of making the attempt before mentioned, being modes devised by the necessities of commerce, the following are the principal actual modes, namely,—

I. In the cases of *Isolated Transactions* between *Private Individuals*, the following, namely,—

1. A letter of Exchange.

This, observe, is not money, but a means to money. The alienation of the Bill of Exchange by indorsement is not attended with either of the two difficulties or evils mentioned above. It is therefore a perfect

form of the materialization of the obligation. There are two sub-varieties of the Bill of Exchange, namely,—

a. Where the Bill is made payable to bearer originally,—a form of the draft which is neither customary nor universally good:

or, *b.* Where the Bill becomes payable to bearer subsequently, a form which the draft assumes upon its indorsement in blank, this being a very usual form and one which is universally good:

2. A Policy of Marine Insurance,—This form even when to bearer is universally good.

§ 64.

II. In the cases of *Actual Quantities* issued by *Public Companies,* the following, namely,—

1. *State Bonds* to Bearer with coupons attached:

These are sanctioned by the law creating them; and the judge is bound to recognise that law;

2. *Prussian Mortgage* or *Debenture Bonds:*

Here the mortgagee or holder of the debenture has his remedy against the bank, and the bank has its remedy over against the noble mortgagor;

3. *Preference Stock* of *Company,* bearing *interest,*—as distinguished from *original shares* in company which bear *dividends:*

These three varieties last mentioned are not, nor are any of them, money, because they are not a common measure, and neither are they *merchandise,* unless for gambling speculations. All these varieties are, however, exempt from both of the two difficulties mentioned in § 62 supra as attending the alienation of obligations.

§ 65.

Are any other varieties of such instruments possible?

If it be asked whether private individuals can create Bills or Notes at pleasure, the answer must be—Certainly not, as regards Letters of Exchange, and as regards also policies of marine insurance, both these being *particular;* and the answer will be,—Dubiously *yes* or *no,* as regards state bonds, Prussian mortgage or debenture bonds, and the preference stocks of companies. However, upon general principles, the answer ought to be,—No, as regards the three last mentioned varieties also. The Roman law furnishes only vague suggestions regarding matters of this sort. The customary law of Germany does not recognise this right in private individuals at all. Moreover, there is no such necessity for them as would counterbalance the hazard of their promiscuous use. And at all events, some public authority is required in any case of their creation.

What is the availability of *Instruments* of this Private Unauthorised sort?

1. They are good as evidence against the party creating them: see Prussian Law of 1833;

and, 2. They are subject in the hands of third persons to all the "equities" subsisting between the original parties to them.

§ 66.

The relation of the *Holders of the Instrument* to the *Instrument itself.* Regarding this there are *two extreme opinions:*

1. That the holder is the *owner* of the instrument, and is put, therefore, to the necessity of proving his ownership in each particular case.

   But an Objection to this view is,—The practical impossibility of such proof of ownership amidst the rapidity and multiplicity of daily transactions.

2. That the holder is the *possessor* of the instrument, without the necessity of proving his mode of coming by it.

But an Objection to this view is,—The opportunity which it affords to thieves.

There is a *Middle Opinion,* however, which is arrived at in the following manner, namely,—

1. Is the true relation to be found in the word *Holder,* or its equivalent in other languages? If so, then the second of the two extreme opinions mentioned above, is the more correct one; the relation would, in that case, be one of *fact,* and not of *law;*

or, 2. Is the true relation to be found in the abstract relation to each other of the parties to an obligation? In this relation, the *creditor's* interests on the one hand are threefold, namely,—

a. His power of alienation;

b. The avoidance of the two difficulties mentioned in § 62;

and, *c.* His protection in the case of the loss of the instrument.

Also,—the *debtor's* interests on the other hand are twofold, namely,—

a. The readiness in the discharge of the obligation;

and, *b.* His security in the discharge of the same.

Now, it is in the reconciliation of these various interests that the true relation of the holder to the instrument is to be found. The fact, therefore, of possession, raises, indeed, (as it ought to raise) the presumption of *ownership;* and accordingly, the possessor is the owner until his title is disputed, and the debtor is able to discharge the debt to him with security. Nevertheless, circumstances of suspicion ought to put the debtor upon his guard, and to cause him to provisorily refuse payment to the holder until the goodness of his title is ascertained or tested.

§ 67.

Practical Consequences of this *Relation* of the *Holder to the Instrument;*

1. Touching the mode of the Transfer of the Instrument. This is effected by simple *Traditio.*

No form of *cession* is requisite to its validity; and in this manner are avoided, the *Two Difficulties* mentioned in § 62.

also, 2. Touching the mode of the Recovery of the Instrument;

A. According to the Roman Law:

and, I. With reference to the right itself to recover the instrument: This right belongs to the true owner.

It is true, that this right has been denied as a general right, and admitted as exceptional only, *e. g.* in the case of a *malâ fide* holder; and the ground upon which the general right to recover has been denied is,—That the parties have unanimously agreed to accept simple *Traditio* as a Transfer: But there are many objections to admitting this reason as conclusive:

For, 1. There is not, in fact, any such unanimity of agreement as that which is alleged;

2. No merely personal agreement can destroy rights *in rem;*

and, 3. It is opposed to the customary Law of Germany.

Moreover, there are other reasons for not admitting the right to be merely *exceptional,* and these are,—

1. That such an admission would be a half measure;
2. That the plea of *dolus* applies only to *obligations* and not to *real rights:*

and, 3. That the exception is a mere independent equity.

It may be concluded, therefore, that the right to recover the instrument is, as a general right, absolute in the same sense as the Roman *Vindicatio* was absolute, with a remedy over analogous to that in cases of *Evictio:*

and, II. With reference to the basis of the right to recover the instrument:

This basis is twofold, namely,—

1. The identity of the instrument, the numbers upon it serving to earmark it;

and, 2. The claimant's proof of ownership, which will be

effected in one or other of the following ways, namely,—

either, 1. By the proof of the *actual ownership* of the instrument by the purchase of it from the State Bank, either by himself or by the person from whom he received it;

or, 2. By the proof of his acquiring the *possession* of the Instrument by purchase within three years, and of his non-alienation subsequently;

or, 3. By the Proof of matters to support the *Actio Publiciana*,—that is to say, by establishing the following points, namely,—

1. A Lawful Possession that is sufficient to lead up to ownership:

and, 2. His *Bona Fides:*

The following are the Defences that are available to the possessor for the time being against a contrary claimant,—

1. Proof of *ownership*,
2. Proof of *justa causa* in mode of acquisition, coupled with *Bona Fides:*
3. Defective Proof of either:

In any case in which both the *claimant* and the *defendant* alike prove *justa causa* in their mode of acquisition and also *bonâ fides*,—

then, 1. Where both claim under one and the same person, he first possessor has the right:

but, 2. Where they claim each under a different person, there the actual possessor retains his possession; and if neither has the possession, the first who obtains the possession keeps it:

and, 3. In the general case, *bona fides* is presumed until *mala fides* is proved,—cf. Code 5. 13. 47: *Praesumitur ignorantia, ubi scientia non probatur:* Moreover, it is for the judge to determine the question of *bona fides*, having regard always to

the circumstances in which the possessor came by the instrument, and in particular to his degree of negligence or of carefulness in receiving it.

§ 68.

The *Modern Law* of *Bills* and *Notes to Bearer.*

Generally, the rule holds that *Possession is ownership,* or as expressed by the German writers, "Hand muss hand wahren," and by the French writers, "Possession vaut titre."

1. According to the *Prussian* law,—

Possession is to be primâ facie presumed to be a lawful *bonâ fide* possession; moreover, *bonâ fides* on the part of the possessor is *primâ facie* to be presumed until the contrary is shown, unless indeed where the possessor has taken the Bill or Note from a suspicious person or under suspicious circumstances.

The possessor is not bound to show or to prove his title. This is a principle which is not indeed expressed, but which is clearly implied in the Prussian Landrecht (just as in the Roman Law); and that this is so appears from the following restrictions which are put upon the principle, being instances in which its application is excluded, namely,—

a. Where the plaintiff proves a fraudulent or forcible deprivation of his possession:

b. Where the proof of defendant's title is, in the opinion of the judge, necessary to bring out certain disputed facts;

and generally, *c.* Where the possession has been acquired *without the consent* of plaintiff, whether by fraud, or by violence, or by *any other means.*

Now, here the question has arisen, whether the theory of *Real* Actions is applicable to the recovery of Bills and Notes to Bearer; and with a view to answering this question, it is necessary to premise the following statement regarding,—

Real Actions generally,—

1. The *Vindicatio,* strictly so called, being the typical real action: The plaintiff in this action must

produce proof of his *right* of *property* in an absolute manner;

2. The *Actio Publiciana*, being the equitable or praetorian real action: The plaintiff in this action must produce proof of a quasi-property, by showing the fact of possession arising *bonâ fide* and *ex justâ causâ*. Now, in this latter case, the defendant may defeat or withstand plaintiff's claim by proving an absolute right of property in himself. Should, however, the rights of plaintiff and defendant be (as they often will be) equal, in respect that each has a possessory title only, then whichever of the two parties makes out any ground of preference for himself is to be preferred in his claim. In all these respects the Prussian Law entirely agrees with the Roman Law.

The question of the Application of the *Real Actions* to *Bills and Notes*,—

1. Neither of these two actions *Vindicatio* and *Actio Publiciana* applies *simpliciter* to the case of Bills and of Notes: on the contrary,
2. Bills and Notes to Bearer are on a level with *money* itself, which, as being without any earmark, is not recoverable by either of these two real actions.

The following question wants a closer examination, namely,—

Can the defendant be compelled in any (and what) case to disclose his title?

Authors and decided cases are alike opposed to the theory which would compel such disclosure, the general opposition basing itself on this ground, namely,—that possession without *cession* is equivalent to or is *title*.

It must, however, be said, that the obligation on defendant to disclose his title to a Bill or Note, exists in all cases in which defendant might be compelled to make such a disclosure in respect of other matters; and the basis of this opinion consists in the following grounds, namely,—

1. The rule of compelling disclosure is a universal rule

of law in the circumstances in which it applies at all:

2. Even a penalty is imposed by law for taking Bills or Notes from suspicious persons, or under suspicious circumstances:
3. The necessity of disclosure establishes, moreover, a just mean between the facility of thieving and the facility of trade.

The Prussian *landrecht* relative to Bills and Notes, is based upon a declaration of the 23rd May 1785, which allows the *vindicatio* only as against a *malâ fide possessor*, and not as against a holder *without value*. The Twelfth Section also of this declaration requires the holder in case of any dispute arising, relative to the Bill or Note, to declare the title upon which he holds it, and if he has forgotten or does not know it, then it requires him to take an oath to that effect.

2. According to the Austrian law,—

Generally, Possession vaut titre (as before); nevertheless, this protection is extended only to a holder *for value*, and a title acquired under suspicious circumstances is rejected.

On the other hand, the Plaintiff must prove—

either, 1. His own right of property,

or, 2. The absence of the possibility of such right in the defendant.

3. According to the French law,—

Recovery is permitted in case of loss or theft, within three years of the occurrence of such loss or theft. In other respects, the French law presents a general resemblance to the Roman law, as do also the laws of other countries generally.

§ 69.

Lastly, 3. Touching the *destruction* of the Instrument:

There is a clear distinction between the destruction of such an *instrument* and that of money; for the instrument may perish, and yet leave the obligation to subsist; and this, notwithstanding that the debtor undertakes merely to pay the HOLDER.

The mode of establishing the fact of *destruction* consists of the following steps,—

1. The Description or identification of the instrument by the numbers upon it:
2. The Proof of ownership in the person alleging destruction:

and, 3. The Proof of the loss which has occurred; whereupon,

4. The proper authorities take note of the numbers, and keep a look-out for the *coupons* being in due course presented: and
   a. If they are presented,—an eventual suit arises between the person alleging loss, and the person presenting the coupons for payment;

but, *b.* If they are not presented,—Advertisements for the holder (if any) are inserted for three years, in the newspapers, requiring him upon pain of being "fore-closed," to come forward with his claim; and in case no claim is made within the three years, the party alleging destruction recovers.

§ 70.

Cases of originally *imperfect* or of subsequently *defaced* instruments,—

1. Where the instalments have not yet been all paid up on the shares of a Company. Upon these, the purchaser is liable to pay up what is unpaid.
2. Where the instruments have been uttered in the name of some Private Individual, but by public authority,—These are the fertile occasion of disputes:
3. Where the instruments are *cancelled* and put out of circulation: Private authority may cancel, but may not re-issue, its own instruments: Private authority may not cancel public instruments.

§ 71.

III. The *Conclusion,* including the *Interpretation* of the *Contract:*

Agreements in general and obligatory agreements in particular arise from a manifestation of the will (volonté) regarded as a *fait juridique* or *factum juridicum.*

The particular parts of this *fait,* are,

1. The will itself,
2. The manifestation of the will,

and, 3. The concordance between the will and the manifestation of it.

With reference to, (1.) The will itself, being the first element in the *fait juridique,*—

a. The *existence* of this element may be rendered doubtful by the following circumstances, namely,—

1. Duress (Vis), 2. Mistake (Error), or, 3. Fraud or Surprise (Dolus):

b. The *extent* of the same element may be qualified by the following circumstances, namely,—

1. Condition, 2. Duration, or, 3. Mode.

With reference to, (2.) The manifestation of the will, being the 2nd element in the *fait juridique,*—This manifestation may be

either, 1. Solemn or Non-Solemn:

or, 2. Express or Tacit:

or, 3. Actual or Assumed.

With reference to (3.) The concordance between the will and the manifestation of the will being the 3rd element in the *fait juridique,*—

Hereunder we must consider the RULES of INTERPRETATION, whose object is to elicit the living thought from the lifeless matter. These rules stated generally are,—

1. To maintain the intention rather than to weaken it, —as expressed in the maxim,—"Ut res magis valeat quam pereat":
2. To consider the intention rather than the words,— as expressed in the maxim,—"Qui haeret in literâ haeret in cortice," and in the maxim,— "Contrahentium voluntatem potius quàm verba spectari placuit." Dig. 50. 16. 219.
3. The custom of the place ought to decide in case of

equivocal words: "Id sequamur quod in regione in quâ actum est, frequentabatur," Dig. 50. 17. 34.

4. To favour the establishment of the *dos*;
5. To favour the discharge of the obligation; see also § 2 *supra*:

and, 6. To favour liberty.

These rules somewhat vary in their particular applications, according as they are applied,

1. To Contracts,

or, 2. To Wills:

For, 1. *In Contracts*, what is for the advantage of the one party, is for the disadvantage of the other; and here accordingly the rule is,—that,

1. In the stipulation, the disadvantage should fall upon the creditor:
2. In sale, that it should fall upon the vendor:

and, 3. In letting, that it should fall upon the lessor:

The reason for this apparently arbitrary rule is,—that in these cases, the creditor, the vendor, and the lessor respectively, had it in their power to be precise: "Ac ferè secundum promissorem interpretamur, quia stipulatori liberum fuit verba latè concipere," Dig. 45. 1. 99: also,—"Veteribus placuit pactionem obscuram vel ambiguam venditori et cui locavit nocere, in quorum fuit potestate legem apertius conscribere," Dig. 2. 14. 39.

The exceptional instance in which the disadvantage is made to fall upon the purchaser merely proves the rule: for if, as in Dig. 18. 1. 34, the purchaser ask for a slave Stichus into the bargain, and there are more than one slave bearing that name, the disadvantage properly falls upon the purchaser for HIS want of precision.

And, 2. In *Wills*, as the act in this case is unilateral, so the interpretation is in all cases to be in favour of the testator, as against the legatee who is the object merely of his bounty.

§ 72.

IV. The *Effects* including the *Object* and *Content* of the *Contract*.

The normal effect of the contract is connected

1. With the distinction between obligations as *actionable* and as *not actionable* (supra);

and, 2. With the distinction between conventions according as they are *legitimae* or *juris gentium* (supra).

The points of essential importance in a consideration of the *effects* of contracts are the following, namely,

that, 1. *Legitimae* conventiones have the full efficacy of the *jus civile*, and moreover, that they have it in virtue of some formality, which is intimately related to the jus civile as expressive of the national manners and customs: The most familiar examples of this species of conventions are,—

1. The *Verbis* obligatio,

and, 2. The *Literis* obligatio,

and that, 2. *Juris gentium* conventiones are *actionable* indeed, but this quality in them arises from a circumstance which is external to them, namely,—the *causa* which underlies them. See Dig. 2. 14. 7,—

Pref. "Juris gentium conventiones quaedam actiones pariunt, quaedam exceptiones."

§ 1. "Quae pariunt actiones, in suo nomine non stant, sed transeunt in proprium nomen contractûs, ut emtio venditio."

§ 2. "Sed et si in alium contractum res non transeat, subsit tamen causa, eleganter Aristo Celso respondit esse obligationem . . . ."

§ 4. "Sed cum nulla subest causa praeter conventionem, hic constat non posse constitui obligationem; igitur nuda pactio obligationem non parit, sed parit exceptionem."

Some of this second class of conventions, that is to say, the *Juris Gentium Conventions* are therefore,—

a. Contractus, while the others of them are,—

b. Nuda Pacta.

This twofold distinction of the Juris Gentium conventiones wants to be considered in detail:

FIRSTLY, therefore, 1. The causa may be either, *a.* A *res*, or *b.* A *consensus*. Thus, the following on the one hand, are,—

i. Instances of Contracts in which the *causa* is a *res*,—namely,

α. Mutuum,
β. Commodatum,
γ. Depositum,
δ. Pignus;

And the following on the other hand are,—

ii. Instances of Contracts in which the *causa* is a *consensus*, namely,—

α. Emtio Venditio,
β. Locatio Conductio,
γ. Societas,
δ. Mandatum.

Again, SECONDLY, 2. While the actions in the case of the *Conventiones Legitimae* are *Condictiones*, the actions in the case of the *Juris Gentium conventiones* are BONAE FIDEI ACTIONES, with the single exception of the *Mutuum*, which has a *condictio:*

But, THIRDLY, 3. Actions might be furnished to the *non-actionable* sub-division of the *juris gentium conventiones* in the following way,—namely, by means of a stipulation made *in continenti*; see Dig. 45. 1. 126, § 2. "Nam quotiens pecuniam mutuam dantes, eamdem stipulamur, non duae obligationes nascuntur, sed una verborum."

This was so in the case of the *Mutuum* absolutely, and became so in other contracts (which were bi-lateral) by being repeated two times over.

§ 73.

Historical Considerations in support of the preceding theory:

a. Touching the *Verbis Obligatio*:

Originally this obligatio consisted in the union of two distinct *facta juridica*, viz.,—

a. The *Nexum*, which was a symbolical weighing of money of account;

and, β. An oral question and answer;

Latterly, in 326, B. C., the *Lex Paetelia* abolished the Nexum, after which the oral question and answer alone remained, becoming, in fact, the contract by *Stipulatio*.

The successive stages in the History of the Stipulatio were these,—

1. The words required to be in *Latin;* but latterly the words might be in any tongue:
2. The words of the question and of the answer required to correspond with a literal exactness; latterly, however, the correspondence of sense and intelligence sufficed: *Leo's* constitution upon this matter, 469 A.D., was only a timely recognition of a law which had already completely changed:
3. The *Presence* of the parties remained indispensable;
4. The Continuity of the act remained indispensable: see Dig. 45. 1. 137,— "Continuus actus stipulantis et promittentis esse debet; ut tamen aliquod momentum naturae intervenire possit: et comminus responderi stipulanti oportet. Caeterum si post interrogationem aliud occeperit, nihil proderit, quamvis eâdem die spopondisset."
5. Writing mentioning the presence of the parties came into use,—see Justin. iii. 19. 12, and iii. 20. 8.

b. Touching the *Literis* Obligatio:

This contract, resting originally on a national peculiarity, went out with the decay of that peculiarity.

c. Touching the *Re* Obligatio:

The so-called *contractus innominati*, viz., 1. *Do ut des*, 2. *Do ut facias*, 3. *Facio ut des*, and 4. *Facio ut facias*, were varieties of this obligation, falling short in some particular matter of the Real Contract proper. Further, and for the same reason, all these four varieties had one common action which was variously designated,—

either as, 1. An *actio praescriptis verbis*,
or as, 2. An *actio in factum civilis*:

d. Touching the *Consensu Obligatio*,—

The principal varieties of this contract were the following, namely,—

1. *Buying and Selling*,
2. *Hiring and Letting*,
3. *Partnership*,
and, 4. *Mandate*,

} being the four commoner, because earlier, kinds of the consensual contract:

also, 5. *Emphytensis*, see Justinian 3. 24. 3,
6. *Pacta Adjecta in continenti*, otherwise called *Pacta Vestita*;
7. *Pacta Praetoria, e. g. constitutum*:
and, 8. *Pacta legitima* (as they are wrongly called);

} being the four less common, because later, varieties of the consensual contract:

Explanation of Technical Terms,—

1. Under the Old Law, the term *Contractus* signified conventions that were *actionable*, and that by the strict civil law; and the term *pactum* signified conventions that were not actionable by that law, and which therefore, of course, were not originally actionable by any law at all.

on the other hand, 2. Under the New Law, the term *Contractus* still signifies conventions

that were *actionable* by the strict *civil* law and by that law only: and the term Pactum also still signified conventions that were *non-actionable* by the strict civil law, but which were become (many of them) *actionable* by the general Roman law.

The term *contractus* is also occasionally used in a looser sense to indicate,—

1. Both *Contract* and *Delict* (as in Dig. 42. 1. 52),

or, 2. Both *Contract* and *Quasi-Contract;* and sometimes even to indicate,—

3. Only *Bonae fidei contractus:*

And again it is sometimes used in a narrow and abusive sense to indicate simply and exclusively the *consensual* species of contracts.

§ 74.

The principle of the distinction of *conventions* into such as are *actionable* and such as are *not-actionable* wants consideration in detail. Laying aside, therefore, for the present the historical series and taking Justinian's classification, and ignoring also for the present the *Re* Obligatio and the *Consensu* Obligatio, and thinking only of,—

1. The Formal or Solemn Convention (Stipulatio),

and, 2. The Non-Formal or Non-Solemn Convention (Nudum Pactum),

The question is,—wherein is the *Stipulatio* so superior to the *Nudum Pactum* as that the former should produce an action, and the latter not do so?

Now, on the one hand,—

1. The Stipulatio is perfect and complete; it is also prudent and deliberate; moreover, it is based upon a national custom. Its advantages of a more particular sort were the following,—

    1. The will of the parties to it was clear;

    and, 2. The praetor's discretion was excluded.

Its disadvantage of a more particular sort was,—that it lay only between persons in the same locality, from which circumstance arose the necessity of the *constitutum.*

§ 75.

On the other hand, 2. The *Nudum Pactum* is imperfect, and at best only preparatory; nevertheless, it produces certain positive effects; it is even based upon a true convention. But it may be asked,—Are not these effects and this efficacy *illogical?* Answer,—they are not: the difference in the degree of the efficacy of each being in this respect decisive. Moreover, the *Nudum Pactum* depending as it does on *accident*, and not on *will*, and therefore absolutely requiring the discretion of the judge, the debtor is thereby saved from prejudice in consequence of it.

Taking up next the *Re* Obligatio and the *Consensu* Obligatio,—

1. These are perfect, and are not merely preparatory;
2. They therefore bind the debtor under a liability; and yet it is not even here illogical that they should do so, notwithstanding the absence from them of all solemnity and formality. For an examination of the particular instances of these two classes of contracts further proves that this effect is logical,—
   1. In the *Real* Contracts,—
      The *Traditio* which takes place in these,—
      not only, 1. Indicates the requisite *intention* of the parties,
      but also, 2. Limits the *extent* of the obligation of the debtor relatively to the creditor in them.
      This statement is completely true of the four original *real* contracts, although indeed it is only partially true of the other later *innominate* ones.

   moreover, 2. In the *Consensual* Contracts,—
      a. With reference to Sale and Hire,—

These are indispensable every-day transactions, and no one therefore can be uninformed as to their consequences. Moreover, the contract of *Exchange*, which was less indispensable, and therefore, also, less known, was originally a *verbal*, and only latterly a *real* contract:

also, *b*. With reference to *Mandate* and *Societas*,—These involve the necessity of rendering accounts, and are therefore in the nature of *real* contracts; also the liberty of determining the agency or partnership at any moment which exists in them in the absence of any stipulation to the contrary, is a further reason which justifies the liability which they impose.

Also,—generally, the *consensual* contracts and (with the exception of the *Mutuum*) the *real* contracts also had *bonae fidei* actions: and thereby the judge might compel the parties (and they themselves even were bound) to do what was just and equitable towards each other in their contractual relation.

This mode of explaining these contracts and the distinctions among their *effects*, is preferable to that other one, which considers the *informal* conventions as being more recent than the *formal* ones, an opinion which is without either authority or truth; or if it be true at all, it is true only of the Pacta *Adjecta*, otherwise called Pacta *Vestita*. For generally, these latter contracts are integral parts of *bonae fidei* contracts, and this is more particularly so of the following varieties of them, namely,—

1. The *receptum* of an arbiter, which, as imposing little restraint, is a duty;
2. The *receptum* of carriers, &c., which, from the thievish disposition of low people, is a necessity;
3. The *constitutum*, which, as implying a previously existing debt, imports deliberation;

and, 4. The promise of a *dos*, which was deservedly encouraged as facilitating marriages.

So that all these four varieties have solid reasons for their validity, although, indeed,—

5. The promise of a *donatio*, which was another such variety suggests no such reason.

§ 76.

Modern Law,—Regular Effects of Contracts:

The *Effects* of Contracts in Modern Law,—and hereunder their *Regular Effects*;

a. The *Stipulatio*,—Here, the question hardly arises at all, inasmuch as that form of *contract* is gone out of use in modern times. It is true, that some authors, in particular *Duarenus*, have maintained the existence of the Roman stipulatio even in modern times; but this opinion is utterly wrong.

How did the *Stipulatio* disappear from modern law?

1. It was not (as some suppose) from the gradual decay of the stipulation even in Roman law;
2. Nor was it (as others suppose) in virtue of a *canon law*, which contained these words —"Pax servetur: *pacta custodiantur*,"— That enactment or decision being a purely ecclesiastical rule in an ecclesiastical matter (the division of parishes):
3. Nor was it (as others suppose) in consequence of some national peculiarity of Germany which was antagonistic to its reception from the first not to mention its abolition afterwards.

§ 77.

But, 4. The true reason of the abolition of the *stipulatio* in modern times is indicated by the following circumstances,—

a. Every system of law must possess some formality of a stricter sort, which of its own self produces an *actio* apart from the particular tenor of the transaction. This formality with the Romans was the Stipulatio.

b. The LAW of the *stipulatio* cannot, however, exist where the FACT of the stipulation does not; now, the stipulation was based upon a national peculiarity of Rome, and such peculiarity was foreign to the German nations.

but, *c.* Germany has notwithstanding preserved the principle, while it has abandoned the form, of the *stipulatio*. This abandonment was, moreover, gradual; and successively as each peculiarity of the form was laid aside, so successively did the stipulation become assimilated with the consensual contract, and even with the *nudum pactum*, so that every convention became eventually productive of an action:

In consequence, however, of the loss of the FORM of the stipulation,— there have arisen two evils,—

1. The want of clear and exact evidence of contracts;

and, 2. The want of serious consideration before entering into contracts.

For the purpose, accordingly, of obviating these evils, *Special Forms* may still be imposed on the contracting parties in one or other of two ways, namely,—

Either, 1. By the will of the parties to the contract, *e. g.* by their making writing necessary, whether as *evidence* merely or as an indispensable *preliminary* to a binding obligation between them.

And here it is necessary to distinguish an *actual contract* from a mere *pactum de contrahendo*,—thus,

A mere Promise by A to sell a house in six months for £500, is a contract full and complete, the money-price being fixed;

But an Agreement to exchange a house for a house is a mere *pactum de contrahendo*, and gives rise to no action at all,

unless either, 1. A Stipulation has intervened,

or, 2. One party has performed his part of the agreement.

Again, such special forms, and for the like purpose may be imposed on the contracting parties in the following way, namely,—

2. By *Special Laws*,—

The imperial rescript of 1551, *e. g.*, requires the bond-debt of a Christian to a Jew to have been sanctioned by the Judge, otherwise it is invalid.

And, again,—The GERMAN *rule of Exchange* of 1849 or thereabouts, requires the observance of the special forms mentioned in the rule. However, it does not say that a contract otherwise entered into shall have no effect, but only that the ready means of process upon it which are provided by the special act shall not be available in a contract neglecting the formalities prescribed by the act.

Again, the PRUSSIAN *landrecht* requires *writing* for a contract over 50 thalers in value;

Also, the Austrian Code prescribes *writing* for a valid *promissio dotis:*

Also, lastly, the *Code Civil* of France requires *writing* for a contract exceeding 150 francs in value. Now, all these special laws, although not resting on any *national* custom, are still valuable in themselves as affording better evidence of the terms of the agreement.

§ 78.

Liebe's theory regarding the stipulation, although erroneous, wants to be noticed. That theory is,—that the stipulation as a solemn form affords, indeed, in itself a ground of action; but that, if without a *causa* binding it to some rela-

tion of material right, it produces no practical effect upon a man's patrimony,—being paralysed by the *doli exceptio* or other like praetorian defence:

Liebe says this *causa* must be either a *donare*, a *solvere*, or a *credere*.

This theory, although specious, is, as we have said, erroneous, and that for the following reasons, namely,—

1. Ulpian in Dig. 2. 14. 7. § § 2 and 4 mentions the *existence*, it is true, of a *causa* as the ground of, and its *absence* as the hindrance to, an actionable obligation; but this passage refers only to *juris gentium conventiones*, as already stated above, and not at all to *legitimae conventiones*.
2. Ulpian, Gaius, Paul, and others speak, it is also true, of traditio as transferring property only if a *causa* underlies the act; and the assumed analogy of the *stipulatio* to the *traditio* is supposed to indicate the necessity of a *causa* for the *stipulatio* also: But this reasoning is altogether erroneous;

For, 1. *Mancipatio* and not *Traditio* was the object of comparison, and, therefore, the supposed analogy between the *stipulatio*, and the *traditio* is erroneous: Moreover,

2. The true signification of the *justa causa* in the passages relative to *traditio* referred to *supra*, is that it is the aggregation of the circumstances preceding the act of *traditio* and establishing the true purpose or intention (volonté) of the parties to that act: so much, indeed, is this the case, that the intention of transferring is frequently used as synonymous with a *justa causa*; *i. e.* with the circumstances manifesting the intention to transfer: But in the stipulation, this *intention*

is *expressly* declared in *words*, so that there is no necessity in the stipulation for any such *justa causa* to be supplied externally or by implication.

moreover, 3. The Actions of *condictio indebiti, sine causâ, ob causam datorum ex injusta causâ*, and others, which are supposed to indicate the mode in which the stipulatio without a *justa causa* underlying it, would be paralysed, cannot be used for such a purpose:

for, 1. These accidental circumstances ought not to be allowed to affect the real nature of the act itself;

and, 2. The *causa* does not relate, as is asserted, to the formal nature of the stipulation in particular, but applies to *consensual* and other contracts also.

lastly, 4. Paul is supposed in Dig. 22. 3. 25. § 4. to say of the *cautio quae indiscrete loquitur*, that there the creditor is obliged to prove the act of law which serves as the basis of the *cautio, i. e.* he must prove a *justa causa*: but in point of fact, this text is not rightly attributed to Paul, it is a rule of Justinian's own, which his compilers derived from a constitution of *Justinus*.

Liebe's practical conclusion regarding the stipulation is, however, correct enough,—namely, *that a stipulation which is erroneous or defective is void.*

§ 79.

IV. The *Effects*, including the *Object* or *Content* of the *Contract* (continued):

The Effects of contracts may be either, 1. *Strengthened*, or, 2. *Weakened*. They are *strengthened*,—

either, α. By an arrha,

or, β. By a penal clause,

or, γ. By a jusjurandum,

or, δ. By a pignus,

or, ε. By an accessory convention:

Considering, 1. The circumstances which *strengthen* the effects of contracts, and hereunder,—

Firstly, α. The *Arrha*, — this amounts to making the contract practically *solemn;* see Justn. 3. 23. pref. — "Nam quod arrhae nomine datur *argumentum* est emptionis et venditionis contractae," see also Dig. 18. 1. 35: —"Quod saepe arrhae nomine pro emptione datur, non eo pertinet quasi sine arrhâ conventio nihil proficiat: *sed ut evidentius probari possit convenisse de pretio.*" Its operation on a contract is twofold, namely,—

1. The property in the *arrha* does not pass to the holder of the *arrha*, but is either returned or entered in account as part of the price;

also, 2. It is not a substitute for the performance of the contract, but is a corroboration of it.

In the case of a *sale*, the *Lex Commissoria*, or law of the forfeiture of the *arrha*, applies where the time fixed for completion is exceeded.

The passage in Justn. III. 23. pref. speaks of a like forfeiture in the case of either party withdrawing while the contract is still only imperfectly complete, from the non-fulfilment of some event: This event was usually the reduction of the contract into writing; but Justinian makes no difference whether the contract was or not to be put in writing in the particular instance ("sive in scriptis sive sine scriptis venditio celebrata est.") And therefore the event must in such a case be something other than the writing, or is the forfeiture in this case, as it certainly appears to be, a penalty?

§ 80.

Secondly, β. The *Penal Clause*,—In form this was usually
1. A *Stipulatio*, but occasionally it was,
2. A *Pactum Adjectum*.

The *penal clause* may be either, 1. *Simple*, —asw here the act which it sanctions is a simple condition of avoiding the penalty; should some *forbearance* and not some *act* be the object of it, a limit of time ought to be fixed, else the *obligation* is discharged only when the contrary act becomes impossible:

Here, the effect of the *penal clause* equals that of an obligation:

The interest of the person stipulating for a penalty need not be commensurate with the amount of the penalty:

Or, the *penal* clause may be, 2. *Complex*, —as where the act is first agreed to be done and the penalty is then added in case it should not be done: In this latter case the penalty is a confirmation, and that in two ways:

either, *a*. In inducing to a performance of the act,
or, *b*. In facilitating the recovery of rights, saving alike *proof* and *summons*.

The true relation of the *Penal Clause* to the *Principal Convention* is the following,—
1. It is a cumulative relation, where a particular act of the will has made it so, as in Dig. 45. 1. 115. § 2: "Quod sine dubio verum erit, quum id actum probatur, ut si homo datus non fuerit, *et homo et pecunia debeatur*."

but, 2. It is an alternative relation, in general; and in this latter case, the only question is,—which of the two things ought to be claimed?

1. In the stipulation,—only the penalty may be claimed, being in this case a *quasi-novatio;*

but, 2. In the *bonae-fidei* contract,—either the one or the other may be claimed, and even both until full indemnity is obtained.

Other matters relative to the Penal Clause, which are of some importance are the following matters, namely,—

1. Time as from which the penalty may be claimed,—this arises immediately upon the violation of the agreement, if it is an agreement to forbear; and immediately upon the omission to do the act when the time for doing it is over and the act is left undone;

2. Where the prevention of the act becomes impossible from no fault of the party submitting himself to the Penal Clause,—

a. In *Stipulation,*—this is no relief:

although, *b.* In *bonae-fidei conventions,*—it is a full relief.

also, 3. Illegality or immorality, open or covert, vitiates the exaction of the penalty, but it is otherwise if the end is moral, Dig. 45. 1. 121. § 1, being the case of a promise by a married man to his wife under a penalty not to go near his former mistress.

thirdly, γ. The Jusjurandum is also a mode of strengthening the effects of the contract; as are also,—

fourthly, ε. Accessory Conventions,—such as the Cautio and the Constitutum, and—

fifthly, δ. Pignus,—which consists in artificially adding to the obligation a *real right.*

§ 81.

Again, the *effects* of contracts may be *weakened* by the following circumstances, namely,—

1. Vis,
2. Dolus,
3. Error, and in particular,
4. The *Impossibility* of the execution, whether that impossibility be,
   a. A *Physical* Impossibility,
   or, β. A *Legal* one, always assuming, however, that the impossibility is an *original* (not an *eventual*) impossibility.

An instance of such an impossibility is a *dation* or *dandi obligatio*, either,

a. Where the thing promised to be given never had (or has ceased to have) an existence, or where the thing cannot in the nature of things exist:

or, β. Where the thing is taken out from among the subjects of property, as being a *res sacra vel publica*: or where it is a succession which has not yet arisen.

The *Rules of Law* applicable to this class of instances are the following:—Generally 1. An impossible obligation is *null*,—Dig. 50. 17. 185, "Impossibilium nulla obligatio est." Also, particularly,

a. In the case of the stipulations (Dig. 45. 1. 35.), without having regard at all to the *ignorance* of the parties;

β. In the case of a *sale* (Dig. 18. 1. 15.), subject to the following distinction, viz., where—

aa. The purchaser is ignorant, he is entitled to an indemnity from the vendor: but where,

ββ. The purchaser either knows of the impossibility or (but for *supina ignorantia*) might have known of it, he is not entitled to any indemnity, just as in *eviction*: However, knowledge or ignorance on the part of the vendor is immaterial.

§ 82.

II. *Delicts*, being the Second Source of Obligations, remain next to be considered.

Delicts, it might be and generally is supposed, are *violations* of *right*, resulting in obligations partly of reparation, and partly of cessation: Thus from every violation of right, there result *obligations* (enforceable by *action* or *exception*) for the *protection* of the *right*, a protection which is effected, both, 1. By the restoration of the actual to the rightful conditions,

and, 2. By the destruction of the unjust *domination* of another.

But, indeed, a further element is wanted to complete the true essence of delict, namely, the *Peine Privée*, or *Private Penalty*,—

which is found in,—The *Bilateral Penal Action*, 1.
but neither in,—The *Unilateral Penal Action*, 2.
nor in,—The Purely *Protective* Action, 3.

Clearly, in the purely Protective Action there is a mere conservation of the old conditions, and again in the Unilateral Penal Action on the one hand there is a mere indemnity, in consequence of which the *offended party becomes* no *richer*, although the offender (it may be) becomes poorer.

But in the Bilateral Penal Action, on the other hand, there is something over and above a mere indemnity, something in consequence of which the *offended party becomes richer* as well as the offending party becoming poorer. Now, it is precisely this increase of richness which equals the *peine privée* of Roman Law; it is the fourfold in Furtum Manifestum, and the threefold in Rapina.

Some actions secure only the recovery of the thing. Again, some actions secure only the penalty (peine privée): But there are others which secure the recovery both of the thing and of the penalty and are therefore called *mixtae*.

Generally obligations resulting from delicts are ACTIONS enforcing a penalty: nevertheless there are obligations resulting from delicts which are not *actions* at all, but something short of actions,—

as, *e. g.* 1. Where a creditor, doing justice to himself, forfeits the recovery of his debt;

2. Where a defendant, denying his own possession, loses his possession accordingly;

3. Where a person, alleging possession falsely, is held to possess in reality, and is accordingly bound to defend the action;

and, 4. Where, in particular actions, the defendant by defending becomes liable in double, for example, in actions *de legato* and *e lege Aquiliâ:* see Justn. III. 27. (28.) 7. and IV. 6. 26.

Some *penal* actions are also *criminal* ones, *e. g.* that of *Injuriae*, and generally the *Publica Judicia;* other penal actions are, however, penal only, and not also criminal, *e. g.* The *querela de inofficioso*, also,—The Interdict *quod vi aut clam.*

§ 83.

The *Peine Privée* or the *Penalty* Proper, that is to say, the penalty as distinguished from the *Indemnity*,—This requires a more particular consideration.

The Peine Privée, so far indeed as regards its *purpose* or *end*, belongs to Public Law (which includes this aspect of Criminal Law); but in all that has reference to its *forms* and *effects*, it belongs to Private Law. Its principal object is, —Judicial Reparation; Its secondary objects are,—

1. Intimidation, whether by threatened or by actual punishment;

2. The Reformation of the offender;

and, 3. The Repression of Private Vengeance.

Penalties have been of every variety, whether death or other circumstance; but with the Romans, they were *money-payments* almost invariably.

The *Publica Judicia* gave the offended party this money-payment, and to that extent they were analogous to private penal actions; but they differed from the latter in this respect, that the individual plaintiff in them represented the state, *prosecuting as the State:* "In popularibus actionibus, *ubi quis quasi unus ex populo agit.*"—Dig. 33. 43. § 2.

These Publica Judicia were generally constituted by Particular Statutes, as the occasion rose, and were in the nature of Temporary or Occasional commissions of Criminal Inquest; although, indeed, latterly, *extraordinaria crimina, i. e.* Permanent Criminal Inquests, became more and more usual. But the ordinary *civil judicia* tried all actions for *private penalties*.

With reference to the question,—Who were the persons entitled to set in motion the *Penal* Procedure,—it appears, that the initiative might have been given either to public officers, or to private individuals; but that the old Roman law gave the initiative invariably to private individuals, while the later Roman Law gave it occasionally to public officers, although even in these later times it was so given only occasionally and exceptionally.

The distinction between the *Public Prosecution* and the *Private Action*,—lay

not in,—1. The Money-Payment,
nor in,—2. The Enrichment of the Plaintiff,
but in,—3. The Option which a Plaintiff had of omitting the action altogether.

Where the offender was too poor to satisfy the penalty of an offence, there his temptation to offend was all the greater; and therefore to repress offences in such cases, the offended party came to have his election between two modes of remedy, either, 1. A Public Prosecution, or, 2. A Private Action; in either of which cases, the judge or praetor might take into account the insufficiency of defendant's means, and punish him otherwise as well, (Dig. 47. 10. 35.) This alternative or discretionary decision was available in actions,

1. Of Theft,
2. Of Insult, Libel, &c.,
and, 3. In Actions of a *Criminal* (as distinguished from those of a merely *Tortious*) nature generally.

Now in consequence of this right of *election*, an offender might have found himself sued in two courts at once, namely,

1. In a civil court,—by the party offended:
and, 2. In a criminal court,—by a stranger acting for the state.

But this injustice or vexation was prevented, where the offence was SINGLE; although, indeed, where the offence was DOUBLE or otherwise CUMULATIVE, there the penal actions were cumulative also, the one of them being private, and the other public; *e. g.* In the case of the *Publicanus* who had extorted a tax,—Dig. 39. 4. 9. 5; and inasmuch as public prosecution was the better, it came to be also the more frequent process of the two: see Dig. 47. 2. 92,—"Nunc furti plerumque criminaliter agi, et eum qui agit in crimen subscribi;" also, Dig. 47. 10. 45,—"De injuriâ nunc extra ordinem ex causâ et personâ statui solet."

§ 84.

The Modern Law relative to Private Penalties.

Here we do not consider

1. Unilateral *Penal* actions, which give an *indemnity* merely:

nor, 2. Actions *in duplum* which are not penalties properly so-called, as, *e. g.*, The *Actio De tigno juncto* and the *Actio De rationibus distrahendis*:

nor, 3. *Publica Judicia*, although these are Penal Bilateral Actions,—these latter having been peculiar to the Roman State as distinguished from all modern states whatsoever whether Republican or Monarchical:

But we consider, 4. *Private Penalties* properly so-called; and the question is—Do these Private Penalties exist in modern law?

Now, Opinions are divided on this matter, some holding—

1. The Affirmative opinion,—and that for the following reasons, namely, as well,—
   - *a.* Because the General Roman Law has been accepted in Germany, as also,—
   - *b.* Because particular decisions appear to have recognised them; others holding,—
2. The Negative Opinion,—and that for the following reasons, namely,—as well,—

a. Because the General Admission into Germany of the Roman law made a particular exception of these Private Penalties; as also, secondly,—

b. Because there is no necessity in modern times to check private vengeance; and thirdly,

c. Because the Enrichment of the offended person is not consistent with the modern idea of what is right.

Nevertheless it ought to be kept in mind here that, among the German nations, *private penalties* were originally very prevalent; thus, *e. g.*, The law of 1495 gave half of the penalty to persons injured by disturbers of the peace; and the law of 1548 renewed the same enactment. Moreover, the *Carolina* recognised the principle.

But the true opinion in the matter is only to be arrived at in the following way,—

Of the three classes of delicts,—

Firstly, Those whose punishment secures the public security,—appear absolutely to reject the Private Penalties at the present day;

secondly, Those which consist in pure *injuriae*,—appear as absolutely to admit the Private Penalties at the present day;

and, lastly, All other delicts, being those offences which fall neither under the First nor under the Second of these two divisions,—appear to admit or not the Private Penalties according to the circumstances and distinctions hereinafter mentioned, that is to say, there being,—

Three Groups of actions or offences, namely—

I. *The First Group*,— comprising,—

Actio furti (man. or nec-man.),
„ Vi bon. rapt.,
„ furti adversus nautas,
„ arborum furtim caesarum,
„ de tigno juncto in case of possessor *malâ fide*,

In all these, the offended party has no power of forgiving the offence, unless through the medium of the judge: So the *Carolina* and the laws also of particular states declare:

II. *The Second Group*,—comprising,—

Libel, &c. In these, the injured person has now an even larger choice than he had in Roman Law, being able to have retractation as well as penalty. Moreover, the private penalty in this case is the more necessary, as a means of repressing duels.

The Reasons of the difference in the modes of punishing the offences of groups first and second, supra, appear to be the following, namely,—

a. Group 1. Was in the Carolina, while Group 2. was not:

also, *b*. The modern *injuria* is restricted to attacks upon the *honour* of the person, whereas the ancient *injuria* was much more extensive.

III. *The Third Group*,—comprising,—

All other delicts,—

Some of these have gone altogether out of use, namely,—

a. The Actio *de Servo corrupto*, unless so far as offences committed upon children in potestas present something analogous to the old offence:

b. The Actio *quod metûs causâ in quadruplum*,
c. The Actio *redhibitoria*,
d. „ *depositi*,

} These were all actiones *arbitrariae*, and therefore they have disappeared.

e. „ *in duplum contra infitiantem*,
f. „ *de calumniatoribus*,

} These were peculiar to the Roman procedure, and they also have therefore disappeared:

Regarding the other members of Group 3. there is much dispute,—

a. The Actio legis Aquiliae,
b. „ de effusis et dejectis,
c. „ de legato venerabilibus locis contra eum qui distulerit solvere, &c.
d. „ de revocandâ donatione propter impietatem,

} All these, however, have gone out of use; and in particular the *actio legis Aquiliae*, which was by far the most frequent of them, has gone out of use.

We may therefore conclude generally,—that in modern times, the *peine privée* has entirely gone out of use, excepting only in the case of the actio *injuriarum*, being the Second Group above.

§ 85.

C. Obligations arising *proprio quodam jure ex variis causarum figuris*. These are the concluding member of the threefold division of the *Sources*.

These *figurae* or sources are the following, namely,—

either, 1. Voluntary Acts on the part of the Debtor,

or, 2. Events which are Involuntary on his part:

Furthermore, these voluntary acts of the debtor are *unilateral*, for if otherwise they would amount to *contracts*;

Moreover, these acts are *lawful* acts, for if otherwise they would amount to *delicts*;

Again, the events which are involuntary on the debtor's part may be

either, 1. Voluntary on the part of the creditor,

or, 2. Purely Accidental and Involuntary on both sides equally.

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